TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM [redacted] 1921

No. [redacted]118

HAMILTON S. WALLACE, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS

FILED AUGUST 7, 1920.

(27,830)

(27,830)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 473.

HAMILTON S. WALLACE, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 1, 1921.

1 *Petition.*

Filed April 2, 1919.

In the United States Court of Claims.

No. 34104.

HAMILTON S. WALLACE, Claimant,

vs.

UNITED STATES OF AMERICA, Defendant.

Petition.

(Filed April 2, 1919.)

The petition of Hamilton S. Wallace, claimant, respectfully shows to the Court:

1. That he is a citizen of the United States and an officer of the United States Army, to wit, a Colonel of the Quartermaster Corps thereof.

2. That your claimant has been an officer of the United States Army for a period in excess of twenty years, and on April 15th, 1912, was by the President nominated to the Senate of the United States to be Assistant Paymaster General, U. S. Army, with the rank of Colonel, to date from February 12, 1912, by promotion from his then rank of Lieutenant Colonel.

3. That the Senate of the United States confirmed said appointment and claimant was duly commissioned; that he executed his oath of office, qualified, and entered upon the duties of the said office.

2 4. That thereafter under the provisions of an Act of Congress, approved August 24, 1912, being Chapter 391 of the Acts of the Sixty-second Congress, Second Session, the office of Assistant Paymaster General was abolished, the Quartermasters Corps, Subsistence Corps and Pay Corps were consolidated, and the claimant was transferred to the Quartermaster Corps (the name of the consolidated corps) with the rank of colonel, which office he has ever since held, and to which he is now lawfully entitled.

5. That thereafter, to wit, on February 18, 1916, there was communicated to claimant through military channels an order stating that he had been dismissed from the Army by direction of the President, under the 118th Article of War.

6. That the said attempted order of dismissal was not in pursuance of the sentence of a court martial or in commutation

thereof, and that the said order did not even specify the charges upon which it was based, and claimant has not been afforded any trial, legal or otherwise, upon any such charges.

7. That after receiving said order claimant wrote a letter to the Secretary of War applying for a court martial, and later on, July 16, 1918, made a second application for court martial, setting forth on oath that he had been wrongfully dismissed, to which he received a reply dated September 17, 1918, from the Adjutant General, U. S. Army, stating that his application for court martial had been disapproved.

8. That said attempted dismissal was wrongful and — violation of claimant's legal rights and the President and Secretary of War have refused to grant him a court martial for a period of six months after fully refuses to assign

his application for same on July 16, 1918, which continued
3 refusal has rendered the order of dismissal void under the provisions of Section 1230, Revised Statutes, U. S., in such case made and provided.

9. That, to wit, on February 6th, 1919, claimant offered himself for duty and claimed his office, but was informed by letter of the Adjutant General, U. S. Army, dated March 3, 1919, that the War Department declines to recognize his claim of being an officer of the Army.

10. The claimant has been at all times ready and willing to perform the duties of his said office, but the Secretary of War wrongfully and unlawfully refuses to assign him to duty or to recognize his right to his office or to the pay and emoluments pertaining thereto.

11. That claimant is justly entitled to his salary at the rate of Five Thousand Dollars ($5,000.) per annum, from the date last paid, to wit, February 13, 1918, and also to commutation of quarters at the rate of One Thousand and Eighty Dollars ($1,080.) per annum from the same date.

12. That claimant has always borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government. That he has not assigned his claim or any part thereof and that he is justly entitled to the amount herein claimed after allowing all just credits and off sets.

13. Claimant further alleges and shows that by reason of the premises there is due and owing the claimant by the United States the sum of Six Thousand, Five Hundred and Eighty and 67/100 Dollars ($-,580.67) as salary and emoluments from February 13, 1918, to March 12, 1919, besides the costs of this suit.

14. And the claimant prays for judgment against the de-
4 fendant in the sum of Six Thousand, Five Hundred, Eighty and 67/100 Dollars ($6,580.67) to and including March 12, 1919.

HAMILTON S. WALLACE,
By FRANK S. BRIGHT,
Attorney for Claimant.
H. STANLEY HINRICKS,
Of Counsel.

DISTRICT OF COLUMBIA, *ss:*

Frank S. Bright, being sworn, deposes and says that he is attorney for the claimant in the above entitled cause; that he has read the foregoing and annexed petition, by him subscribed and knows the contents thereof, and that the statements therein made are true to the best of his knowledge, information and belief.

FRANK S. BRIGHT.

Subscribed and sworn to before me this 31st day of March, 1919.

S. L. STRUBLE,
Notary Public, D. C.

II. *General Traverse.*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

5 III. *Argument and Submission of Case.*

On February 19, 1920 this case was argued and submitted on merits by Mr. H. Stanley Hinrichs, for claimant, and by Mr. Richard P. Whiteley, for the defendant.

IV. *History of Proceedings After Submission.*

On March 22, 1920, the court filed findings of fact and conclusion of law dismissing petition. Judgment against claimant in the sum of $404.76 for the printing of record, with an opinion by Campbell, Ch. J.

On May 6, 1920, the claimant filed a motion for a new trial.

On June 1, 1920, the court filed an order allowing in part and overruling in part claimants's motion to amend findings of fact, vacating former findings of fact and filing new findings of fact, and ordering that opinion and judgment of March 22, 1920 stand.

Said findings of fact (as amended), conclusion of law and opinion are as follows:

6 V. *Findings of Fact (as Amended), Conclusion of Law, and Opinion of the Court by Campbell, Ch. J.*

Entered June 1, 1920.

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff was duly and legally commissioned Assistant Paymaster General with rank as Colonel in the United States Army by the President, by and with the advice and consent of the Senate, on April 26, 1912. The Commission isued to him was in the usual form, and states: "This commission to continue in force during the pleasure of the President of the United States for the time being." He executed his oath of office on May 7, 1912, and entered upon his duties as such officer.

II.

By act of Congress approved August 24, 1912, the office of Assistant Paymaster General was abolished and plaintiff was transferred to the Quartermaster Corps, with rank of colonel, which office he continued to hold until February 13, 1918.

III.

The plaintiff served as an officer in the United States Army continuously from October 29, 1898, and was paid the salary and emoluments of his office as colonel, Quartermaster Corps, up to February 13, 1918. The salary to which he was then entitled was at the rate of $416.67 per month and the allowance to which he was entitled for commutation of quarters was then at the rate of $84 per month.

IV.

On February 8, 1918, the Secretary of War recommended to the President that the plaintiff be dismissed from the service, and the President on February 11, 1918, issued an order dismissing the
7 plaintiff from the service, which dismissal was announced by General Orders, No. 17, of February 13, 1918, and the plaintiff was notified of said order on the same day. The said order and notice to claimant did not inform him of the charges upon which his dismissal was based. At the time the above order was issued the United States was at war with Germany. On March 1, 1918, Lieut. Col. Robert S. Smith, Quartermaster Corps, was nominated by the President to the office of colonel with rank from

February 14, 1918, and on March 8, 1918, the nomination was confirmed by the Senate. This filled the complement of 21 officers allowed in that grade. The President's nomination to the Senate of Lieut. Col. Smith and another, made on March 1, 1918, is as follows:

The White House,
Washington, March 1, 1918.

"To the Senate of the United States:

"I nominate the officers herein named for promotion in the Army of the United States.

"Quartermaster Corps.

"To be Colonels.

"Lieutenant Colonel Robert S. Smith, Quartermaster Corps, with rank from February 14, 1918.

"Lieutenant Colonel Richmond McA. Scofield, Quartermaster Corps, with rank from February 23, 1918.

"To be Lieutenant Colonels.

"Major Morton J. Henry, Quartermaster Corps, with rank from *rank from* February 14, 1918.

"Major William Elliott, Quartermaster Corps, with rank from February 23, 1918."

These officers were confirmed by the Senate *in* March 8, 1918.

V.

On June 24, 1918, plaintiff made an informal application for trial by court-martial and on July 16, 1918, plaintiff made in writing an application for trial, setting forth under oath that he had been wrongfully dismissed. The said application was received by The Adjutant General of the United States Army August 5, 1918, within six months after the order of dismissal. On September 14, 1918, plaintiff's application for trial was refused by the Secretary of War, of which plaintiff was duly informed. It does not appear that the application reached the President. No court-martial was at any time convened to try the plaintiff upon the charges under which he was dismissed.

Prior to June 24, 1918, and after his dismissal, plaintiff had been advised that he could seek relief through Congress, and, until he was informed of it on that date he did not have actual knowledge of section 1230, Revised Statutes.

8

VI.

On February 5, 1919, six months after the receipt by the War Department of his application for trial, a court-martial for the trial of the plaintiff had not been convened, and plaintiff then reported for duty under section 1230, Revised Statutes of the United States. The War Department refused, and continues to refuse, to recognize his claim to be an officer of the United States Army.

VII.

If the plaintiff is entitled to recover there is due him as salary from February 14, 1918, to March 12, 1919, inclusive, the sum of $5,416.71, and there is due him for commutation of quarters during the same period the sum of $1,092, making a total of $6,508.71.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law that the plaintiff is not entitled to recover, and that his petition ought to be, and the same is, hereby dismissed. Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be entered by the chief clerk and collected by him in the manner prescribed by law.

Opinion.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

By an order of the President, dated February 11, 1918, Col. Wallace, Quartermaster Corps, United States Army, was dismissed from the service of the United States under the provisions of the one hundred and eighteenth Article of War. The dismissal was made upon the recommendation of the Secretary of War, who stated, in his communciation, his reasons for making it. The plaintiff was notified of the President's action on February 13, 1918. In July, 1918, he made an application for trial by court-martial, setting forth, under oath, that he had been wrongfully dismissed. This application was received by The Adjutant General on August 5, 1918, was referred to the Judge Advocate General for an opinion, and that officer concluded that it should be denied. On September 7, 1918, the plaintiff was notified that his application for a court-martial had been disapproved by the Secretary of War. It does not appear that it ever reached the President.

On February 5, 1919, the plaintiff reported to The Adjutant General for duty, claiming the benefits of section 1230, Revised Statutes.

Subsequent to the order of dismissal, another officer was nominated to the Senate and confirmed by that body. By that appointment and confirmation the complement of officers allowed in the grade was filled, being 21 in number.

The question in the case is, whether the dismissal of the plaintiff by the President's order, or the nomination to and confirmation by the Senate of another, had, in either case, the effect of creating a vacany in the office held by him.

The contention on behalf of the plaintiff is that section
9 1230, Revised Statutes, sustains his right of recovery, because, it is urged, he seasonably applied, in due form, for a court-martial following the dismissal order; his application was denied; a court-martial was not convened to try him on the charges on which he was dismissed, and that, as a consequence, the order of dismissal was rendered void by force of the statute. To attain the result thus contended for it must be concluded that the order of dimissal was not effectual to create a vacancy in the office held by plaintiff at the time, but was rather a suspension until such reasonable time had elapsed within which the officer could invoke the benefits of the statute under which he asserts his claim.

It can not be seriously questioned that if a vacancy in his office was created by the officer's dismissal it could only be filled by new appointment made by the Executive, by and with the consent of the Senate. It could not be filled by legislative enactment. Woods's Case, 107 U. S., 414 (15 C. Cls., 151); Mimmack Case, 97 U. S., 426, 437; Corson Case, 114 U. S., 619, 622. Nor can it be successfully denied that the authorities establish these propositions—(1) that, unless limited by some statute the President may summarily dismiss an officer from the military service; and (2) that the President and Senate, as an incident to their constitutional power of appointment, may displace an officer and thereby create a vacancy. Whether this latter power can be limited by statute it is unnecessary here to determine.

In McElrath's case, 12 C. Cls., 201, this court, in an opinion by Judge Loring, refers to Ex parte Hennen, 13 Pet., 230, and says:

"On this authority there are two distinct constitutional powers of removal—one vested in the President and Senate as incident to their power of appointment; the other vested in the President alone, as an attribute of the executive power belonging to his office. And as to this, and probably in consequence of the construction made, the form of commissions adopted for officers of the Army and Navy and Marine Corps would seem intended to prevent all question; for now the commissions run 'for and during the pleasure of the President.' This no one can determine and declare but himself; and when he declares it the commission necessarily expires by the express terms of its limitation."

To the same effect is Gratiot's case, 1 C. Cls., 258 (decided in 1865). And the plaintiff's commission ran "to continue in force during the pleasure of the President for the time being."

The power in the President to summarily dismiss an officer is conceded in McElrath's case, 102 U. S., 426, 437.

In Mimmack's case, 97 U. S., 426, 437, it is said:

"Prior to the act of the 13th of July, 1866, the President could dismiss an officer in the military or naval service without the concurrence of the Senate."

And in Blake's case, 103 U. S., 227, 231, the court says:

"From the organization of the Government under the present Constitution to the commencement of the recent war for the suppression of the rebellion, the power of the President, in the absence of statutory regulations, to dismiss from the service an officer of the Army or Navy was not questioned in any adjudged case or by any department of the Government."

Equally positive are the cases in declaring that an officer may be displaced by the appointment of another in his place by the President, by and with the advice and consent of the Senate. Blake case, supra; McElrath case, 102 U. S., 426, 438; Keyes case, 109 U. S., 336; Mullan case, 140 U. S., 240.

Assuming that the effect of the appointment and confirmation of Col. Smith was to displace the plaintiff, the principle just stated would dispose of this case, except possibly for the short period elapsing between the date of the order of dismissal and the taking effect of the new appointment.

To dispose of the entire claim, however, it becomes necessary to determine whether section 1230 furnishes any aid to the plaintiff. We have not been referred to any case where this section, or the act of March 3, 1865, 13 Stat., 489, from which it was taken, has been construed. The Newton case, 18 C. Cls., 435, refers to it, but that case was decided upon the point that, in any event there had been too much delay in the attempted assertion of a claim by the plaintiff therein. It arose out of the exercise of an authority conferred by the act of 1870 on the President to drop from the rolls of the Army for desertion an officer absent from duty three months without leave; and while disposing of the case upon the ground mentioned, it is said (p. 444) to be the opinion of the court that the act of 1870 "was intended to give to the President a fresh grant of power to be exercised at that time, independent of the acts of 1865 and 1866."

This act of 1865 is referred to and quoted in the Blake case, but no effect is there ascribed to it as bearing upon the President's power of dismissal. There is a reference to it in section 2 of the act of June 22, 1874, 18 Stat., 191, but that section relates to the case of an officer of the Navy dismissed from the service and "restored" to the same. It does not appear how the restoration took place, and from the whole section it appears that the officer is not restored to office.

Section 1230 constitutes the revision of the 12th section of the act of March 3, 1865, 13 Stat., 489, which was as follows:

"And be it further enacted, That in case any officer of the military or naval service who may be hereafter dismissed by authority of the President shall make an application in writing for a trial, setting forth under oath that he has been wrongfully and unjustly dismissed, the President shall, as soon as the necessities of the public service may permit, convene a court-martial to try such officer on the charges on which he was dismissed. And if such court-martial shall not award dismissal or death as the punishment of such officer, the order of dismissal shall be void. And if the court-martial aforesaid shall not be convened for the trial of such officer within

six months from the presentation of his application for trial, the sentence of dismissal shall be void."

The act of July 17, 1866, 14 Stat., 92, was construed in Blake's case to be applicable only to cases of dismissal in time of peace. The plaintiff's dismissal was in time of war and is unaffected by the act of 1866. The terms of the act of 1865 do not confine it to time of peace. The terms are general. It does not express any purpose to limit the President's power to dismiss. On the contrary, it recognizes that power, and clearly imports, by its language, that there shall have been a dismissal before the officer can invoke its
11 provisions. It does not speak of suspension, but does mention dismissal.

At the time of the enactment of this act, that of July 17, 1862, 12 Stat., 596, was in full force, and by the latter the President had been "authorized and requested to dismiss and discharge from the military service" any officer whose dismissal, in his judgment, would promote the public service. Its force is to be found in the word "requested." Blake case, 103 U. S., 227, 234.

It is not to be presumed, nor does the language of the act indicate, that the power which Congress had thus in 1862, in time of war, requested the President to employ, was intended to be taken away from him or limited in 1865, the war then continuing. And the history of the enactment confirms this view.

The section under consideration was incorporated in the act by a committee of conference, in composition of differences between the two Houses of Congress (Cong. Globe, 38th Cong., 1378). A great deal of discussion upon different bills relative to dismissals of officers had occurred in the two Houses (Cong. Globe, 38th Cong. 138, 128, 36, 134 5). Reporting the results of conference to the Senate Senate Wilson stated that the House had adopted an amendment which required a trial upon charges before dismissal, that the committee of conference had modified the amendment and agreed "that the power to dismiss an officer shall not be taken away, but that if he makes application for a trial after his dismissal by the President he may have a court-martial."

One Senator facetiously stated that the report was perfectly clear to him and meant that if the court-martial did not acquit the officer or shoot him, "the President may reinstate him, and after he is shot the reinstatement will — amount to very much!"

But while the language of the act justifies the conclusion that the power to dismiss an officer was not taken away, his reinstatement is not left to stand upon the action of a court-martial, as the Senator suggested, because the order of dismissal, it is declared, shall be void if a court-martial be not convened. Nor, indeed, does the act contemplate any execution of a sentence of a court-martial if convened. It declares that the order of dismissal "shall be void" if the court-martial does not award dismissal or death, but implies that the President's order shall stand if the court-martial's sentence should call for severer punishment. In other words, the effect upon the order of dismissal is the same whether the court-martial be not convened at all, or, being convened, award a different punishment than mere dismissal.

Manifestly the language is not aptly chosen, and the meaning to be ascribed to the act is obscure. If it be assumed that it was not its intention to limit the power of dismissal (and its terms certainly import that it treats the dismissal as a fact) then the declaration that this order of dismissal shall be void, because of something subsequently occurring, could not be effective to restore the officer to his office. Let it once be admitted that the officer was dismissed from the service, and it must follow that the effect of the order dismissing him was to sever his relations with the Army. As was said in Corson's Case:

"Thenceforward and until in some lawful way again
12 appointed he was disconnected from that branch of the public service as completely as if he had never been an officer of the Army."

The vacancy so created could only have been filled by a new and original appointment, to which, by the Constitution, the advice and consent of the Senate was necessary. Corson Case, 114 U. S., 619, 622.

If it be said that the language of the act, though specific in its reference, does not imply that the officer is or can be dismissed by the President's order, but means that the order has the effect of only suspending him from duty, then the act provides no method of determining the status of the officer if he fails to demand a court-martial; nor does it provide, if a court-martial be convened, for any execution of its award.

Assuming the officer is dismissed, and therefore severed from the service, the act presents the situation of a person out of the service being entitled to trial by court-martial upon his own request. Those subject to military law, as well as the jurisdiction of courts-martial, are defined by the Articles of War (39 Stat., 651). It is certainly the general rule that the military law is applicable to military persons alone, and that they cease to be amenable to it after their separation from the service. Davis Mil. Law, 46, 58, Art. V, Constitution.

We have pointed out some of the difficulties that would attend the act in its practical operation; and since the restoration of an officer who has been lawfully dismissed from his office requires a new appointment, it would seem that the act, or section 1230, does not, in any event, affect the office that was held by the dismissed officer or entitle him to its emoluments. But whether the purpose of this section is fully met by a court-martial, properly so called, or a court of inquiry, or some other body authorized by an order of the President, whose findings can go to the officer's record, or make him eligible to reappointment, or whether a broader meaning should be accorded to it, we need not determine, because our opinion is that section 1230 is superseded by the Articles of War enacted as part of the act of August 29, 1916, 39 Stat., 651, 669. This act in express terms repeals all laws or parts of laws inconsistent with its provisions; and as it recognizes and declares, in the one hundred and eighteenth article, the power in the President to summarily dismiss an officer in time of war it must be accepted as the latest legis-

lative expression on that subject, and this with other of its provisions renders section 1230 inoperative.

It results that as the plaintiff was dismissed from the Army in time of war by a valid order of the President, and as he has not been reappointed in the mode prescribed by law, he is not entitled to the pay allowed to an officer in the service for the period in question. His petition is therefore dismissed.

Graham, Judge; Hay, Judge; Downey, Judge; and Booth, Judge, concur.

13 VI. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the First day of June, A. D., 1920, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendant, and do order, adjudge and decree that Hamilton S. Wallace, as aforesaid, is not entitled to recover any sum in this action of and from the United States; and that the petition herein be and it hereby is dismissed: And it is further ordered, adjudged and decreed that the United States shall have and recover of and from Hamilton S. Wallace, as aforesaid, the sum of Four Hundred and Four Dollars and seventy-six cents ($404.76), the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

By THE COURT.

VII. *Claimant's Application for and Allowance of an Appeal.*

To the Chief Justice and Judges of the Court of Claims:

Claimant hereby prays an appeal to the Supreme Court of the United States from a judgment of this court rendered on the 1st day of June, 1920, reaffirming a judgment rendered on the 22nd day of March, 1920, by which the petition was dismissed.

FRANK S. BRIGHT,
Attorney for Claimant.

H. STANLEY HINRICHS,
Of Counsel.

Filed July 27, 1920.

Ordered: That the above appeal be allowed as prayed for.

July 30, 1920.

EDWARD K. CAMPBELL,
Chief Justice.

14 Court of Claims.

No. 34104.

HAMILTON S. WALLACE

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact, conclusion of law and opinion of the court by Campbell, Ch. J.; of the judgment of the court; of the claimant's application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 2nd day of August A. D., 1920.

[Seal of the Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 27,830. Court of Claims. Term No. 473. Hamilton S. Wallace, appellant, vs. The United States. Filed August 7th, 1920. File No. 27,830.

SUBJECT INDEX.

TABLE OF CASES.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921

No. 118

HAMILTON S. WALLACE
Appellant
vs.
THE UNITED STATES
Appellee

On Appeal from U. S. Court of Claims.

BRIEF.

STATEMENT OF FACTS.

The appellant served as an officer of the U. S. Army continuously from October 29, 1898, and as Colonel, from April 26, 1912, until February 11, 1918, when he was summarily dismissed by the President. The order and notice of dismissal did not inform appellant of the nature of any charges upon which his dismissal was based. He was in the Quartermaster Corps from August 24, 1912, until dismissal.

Within six months after his dismissal (on July 16, 1918) appellant made, in writing, an application for trial by Court Martial, setting forth, under oath, that he had been wrongfully dismissed. On September 14, 1918, his application for trial was refused by the Secretary of War and appel-

lant so informed. No court martial has been convened at any time to try the appellant upon any charges under which he was dismissed, and on February 5, 1919 (six months after the receipt by the War Department of his application for trial) appellant reported for duty under Section 1230 Revised Statutes, U. S. The War Department refused and still refuses to recognize his claim to be an officer of the United States Army.

On March 1, 1918 (18 days after appellant's dismissal) the President made the following nominations in the Army:

> "Quartermaster Corps,
>
> "To be Colonels:
>
> "Lieutenant Colonel Robert S. Smith, Quartermaster Corps, with rank from February 14, 1918.
>
> "Lieutenant Colonel Richmond McA. Scofield, Quartermaster Corps, with rank from February 23, 1918."

These officers were confirmed by the Senate on March 8, 1918, and said appointments filled the complement of 21 officers allowed in that grade.

The question at issue in this case is whether appellant was legally removed from his office by the order of dismissal, or superseded therein by the filling of the complement of officers of his grade by said appointments of Smith and Scofield, inasmuch as neither of said appointments referred to him or his dismissal in any way.

The appellant contends that under the provisions of Section 1230 Revised Statutes, U. S., he is entitled to his office, and sues for his salary from the date of his wrongful dismissal. The court below dismissed the petition on the ground that said statute is not operative, but was repealed by an Act of Congress approved August 29, 1916, and that the President had the power to summarily dismiss appellant independent of any statute; and anyway, appellant was superseded in his office by the filling of the complement of

Colonels allowed by law, when Smith and Scofield were appointed.

The case appears to be the first one to be presented to this court which directly involves Section 1230, Revised Statutes, U. S. The claim of appellant depends upon the validity of said statute which he contends is in full force and effect, and cannot be fairly construed without granting him the relief prayed for herein.

ASSIGNMENT OF ERRORS.

The errors assigned include the following:

In dismissing appellant's petition and rendering a judgment in favor of the United States.

In failing to render a judgment in favor of appellant.

In holding that the summary dismissal by the President of an officer in the Military Service operates to entirely separate him from said service and creates a vacancy in that office.

In assuming that the mere filling of the complement of officers allowed in any grade in the U. S. Army operates to displace an officer of that grade who has been summarily dismissed by the President.

In holding that Section 1230 of the Revised Statutes is not operative.

In holding that Section 1230 of the Revised Statutes is superseded by the 118th Article of the Articles of War enacted as a part of the Act of August 29, 1916 (39 Stats. 651,669), notwithstanding that said article is identical in terms with Article 99 of Section 1342 of the Revised Statutes.

In holding that an officer of the U. S. Army summarily dismissed by the President is thereby entirely disconnected with the Army, and is not subject to military law, and therefore may not be tried by Court Martial upon his ap-

plication made in accordance with Section 1230 of the Revised Statutes; and that in such a case the trial by court martial having been regularly applied for and refused, said officer can regain his office only by an original appointment by and with the advice and consent of the Senate.

In holding that the President has power to finally dismiss an officer of the U. S. Army without court martial independent of any statute.

SUMMARY OF ARGUMENT.

In the following argument it is contended that:

1. Appellant is entitled to his office of Colonel, U. S. Army, by virtue of the provisions of Section 1230, Revised Statutes, U. S.

2. The enactment of the Act of August 29, 1916, (article 118 of the present Articles of War) did not repeal Section 1230, Revised Statutes, or in any way change the laws of the United States governing the dismissal of officers of the U. S. Army.

3. Section 1230, Revised Statutes, U. S., does not create a novel situation, and its operation does not present any real difficulty in any contingency which may happen.

4. Section 1230, Revised Statutes, U. S., operates to nullify and render void, under certain circumstances, a summary dismissal by the President of an officer in the U. S. Army, and in such a case it is not necessary that such officer be again nominated and confirmed by the Senate in order to be restored to his office.

5. An officer of the U. S. Army, summarily dismissed by the President, is subject to military law under Section 1230, Revised Statutes, U. S., which Statute prescribes the tribunal to try him, and provision has been made by law for the execution of the award of the court martial in such

a case.

6. The President alone has no power to dismiss an officer of the U. S. Army except such as has been conferred by Statute.

7. The President *alone* has no implied power to dismiss an officer of the U. S. Army under the Constitution of the United States as an incident to the power of appointment.

8. An officer is not superseded in his office where, as in the case at bar, the Senate fails to concur in the appointment of someone named as his successor.

9. The President has no implied power to dismiss an officer of the U. S. Army under his Constitutional power as the Chief Executive.

10. The President alone has no authority to dismiss an officer of the U. S. Army because of the terms of the commission issued to such officer.

11. The President has no authority to dismiss an officer of the Army by virtue of his Constitutional relation as Commander in Chief.

12. Conclusion. The decision of this Court must be in favor of appellant, and he is entitled to a judgment for the amount set forth in finding of fact No. VII of the Court below.

ARGUMENT.

1. APPELLANT IS ENTITLED TO HIS OFFICE OF COLONEL, U. S. ARMY, BY VIRTUE OF SECTION 1230, REVISED STATUTES, U. S.

Said Section 1230 provides that

> "When any officer, dismissed by order of the President, makes, in writing, an application for trial, setting forth, under oath, that he has been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court martial, to try such officer on the charges on which he shall

have been dismissed. And if a court martial is not so convened within six months from the presentation of such application for trial, or if such court, being convened, does not award dismissal or death as the punishment of such officer, the order of dismissal by the President, shall be void."

The findings of fact which have been adopted by the Court below are to the effect that Col. Wallace was summarily dismissed by authority of the President (finding IV), that he did make, in writing, an application for trial, setting forth, under oath, that he had been wrongfully dismissed, and that the court martial was not convened within six months from the presentation of such application for trial (finding V). **And the Statute, by language which cannot be given any other meaning declares that in such a case "the order of dismissal of the President shall be void."**

Section 1230 R. S. is designed to protect officers in their constitutional rights. It is simple in its terms and reasonable and just in its operation. The summary dismissal by the President is effective unless the officer protests his innocence. It is void if the officer protests his innocence and the War Department shall refuse a trial. If a trial is granted, the officer is dismissed or restored in accordance with the verdict of the court martial. The President may desire to reinvestigate a case in the event of an officer's denial of guilt, and so he is given six months after the application for court martial within which to determine whether the accused shall be tried upon the charges against him, or be restored to his office.

The dismissal of an officer carries with it disgrace, financial loss, and the ignominious ending of an honorable career, and the issuance of such an order by the President is a grave responsibility to a subordinate whose rights he is charged by law and his oath of office to protect. If we were in the unhappy state where the acts of the President could

not be questioned, but were conclusive, we would be imputing to him an infallibility which is to be expected in no earthly officer or tribunal. In this case, however, the President's power was used and abused by his subordinates, and the injustice which was done can only be imputed to him by virtue of legal presumptions. The record does not show that he personally refused the court martial. However, both the unjust dismissal and refusal of court martial are legally chargeable to him.

Aside from the power conferred upon the President alone, *in time of war*, embodied in Article 118 (formerly Article 99) of the Articles of War, an officer of the U. S. Army may not be dismissed except upon conviction by a General Court Martial upon one or more of certain specified offenses which are enumerated in the Articles of war. (See Section 1229, Revised Statutes.)| In military parlance the word "dismiss" implies punishment, and when a dismissal is ordered by the President it should be by way of punishment for some specific offense which, presumably at least, can be stated in the form of charges on which the accused might be brought to trial by General Court Martial. The failure to specify any charge in the order or notice of dismissal of appellant, coupled with the refusal of a trial, when applied for, are sufficient to condemn the dismissal as an arbitrary abuse of power, and warrant the assumption that the dismissal was based upon reasons which were utterly insufficient to justify it.

It is our boast that a day in court is guaranteed to all men. It does not at all comport with our ideals or institutions to condemn men without a hearing, or to refuse an accused any opportunity to show his innocence. And so every intendment, every assumption, every presumption, and every doubt should be resolved in favor of an officer dismissed without trial, and against the confirmation of a summary dismissal. Manifestly Congress never intended

the power of dismissal to be exercised in any such manner as was done in this case. It was a travesty upon justice and a farce, at variance with constitutional rights which military and civil courts are required to protect.

The grant of power carries with it the responsibility to exercise it justly and with the intent to accomplish the purposes of the grant. The President may dismiss an officer in time of war for any reason deemed by him sufficient, but in the exercise of that power he is charged with the responsibility of acting justly. Even if his actions are based upon the best of intentions he may in some cases do wrong, because he is human, and to correct a wrong done by him, intentionally or otherwise, certainly is not repugnant to our institutions, or against the dignity of his office, or contrary to the Constitution, or foreign to purposes of our courts.

Section 1230 R. S. specifically grants to an officer who has been wrongfully dismissed, as in this case, the opportunity to defend his good name, uphold the honor of his service, and vindicate the truth. The said Section was intended to insure that an order of summary dismissal should be based upon good and sufficient grounds. It provides, in effect, that if an officer is dismissed without trial the order is effective unless, and until, he shall protest under oath that it is wrongful; if a court martial, after trial, shall render a verdict in accordance with the order, it is effective; but if the officer not only protests but shows to a court martial that the dismissal was wrongful, the order is void—as it should be; or if he is refused an opportunity to show that the dismissal was wrongful, the said order is void—as it should be.

The decision of the Court of Claims in this case is the first one of any court (so far as we have been able to discover) which questions the validity or the manifest purpose of Section 1230 of the Revised Statutes, first enacted as Section 12 of an act of Congress (Chap. 79) approved

March 3, 1865 (13 Stats. at L., p. 489). The Constitutionality of its provisions was affirmed by the Attorney General on August 6, 1866 (*12 Opp. Atty. Gen., 4*), and the Court of Claims construed it and cited it with approval in the case of *Neaton vs. the United States* (*18 Ct. Cl. 434*). This Court referred to it as subsisting law in the case of *Blake vs. United States* (*103 U. S. 227*); but both the *Neaton & Blake* cases were decided upon some other point.

It is not surprising that there are no decisions of courts which directly involve Section 1230, Revised Statutes. The power of summary dismissal is one which should be exercised only under extraordinary circumstances, and in the clearest cases. Since 1866 it has been permitted in time of war only, and therefore the periods have been limited during which it was possible to exercise the power. It speaks well for the officers of the army and navy and for the Presidents who have administered the law, that this seems to be the first case in which a court has been required to pass in judgment upon its exercise. But there can be no question as to the validity of the law which limits and prescribes the effect of a summary dismissal by the President in time of war. By another statute (Section 1229, Revised Statutes, U. S.,) the President has been denied the power to summarily dismiss an officer in time of peace, and there have been many decisions in which that law has been upheld. Certainly if Congress has the power to deny altogether the exercise of the power of dismissal in time of peace, there can be no question of its power to regulate or limit the effect of dismissal in time of war. As to the validity of the act of Congress depriving the President of the power to dismiss in time of peace, see

United States vs. Perkins, 116 U. S., 483.
Keyes vs. U. S., 109 U. S., 336.
Blake vs. U. S., 103 U. S., 227.
McElrath vs. U. S., 102 U. S. 426.

Mullan vs. U. S., 140 U. S., 240.
Crenshaw vs. U. S., 134 U. S., 99.
Hartigan vs. United States, 196 U. S., 196.
United States vs. Andrews, 240 U. S., 90.
Street vs. United States, 133 U. S., 299.
Fletcher vs. U. S., 26 C. Cl., 541.
Garrick vs. U. S., 24 C. Cl., 264.
Harmon vs. U. S., 23 C. Cl., 132.

2. THE ACT OF AUGUST 29, 1916, (39 STATUTES 651, 669) DID NOT REPEAL SECTION 1230 OF THE REVISED STATUTES, OR CHANGE IN ANY PARTICULAR THE LAW GOVERNING DISMISSALS OF OFFICERS OF THE U. S. ARMY.

The Court below erred in holding that the Act of August 29, 1916, repealed Section 1230 of the Revised Statutes (Transcript, page 10). On the contrary, by its very terms, said act of Congress is an amendment of Section 1342, Revised Statutes, and does not even refer to Section 1230. So far as Article 118 is concerned, the **amendment consists in changing the number of said article from 99 to 118!** The language of Article 118 of the present articles of war, quoted by the court below as having the effect of repealing Section 1230, R. S., is identical with the language of Article 99 of Section 1342 of the Revised Statutes which it supersedes. Said Article 99 was enacted at the same time, and as part of the same general law as Section 1230. They are statutes *in pari materia*, and it is fundamental that they would have to be construed together so as to give effect to each, but a reading of them will convince anyone that they are not inconsistent with each other, and it is not necessary to annul or modify any provision of either section to give full force and effect to all of the provisions of the other section.

Surely it is sufficient to state the proposition that the enactment of Article 99 of Section 1342 did not render

nugatory the provisions of Section 1230, enacted **at the same time, and that the same language reenacted at a later date could have no greater or different effect than in the original statute.**

U. S. vs. Freeman, 3 Howard, 556.

3. SECTION 1230, R. S., DOES NOT CREATE A NOVEL SITUATION AND DOES NOT CREATE ANY REAL DIFFICULTY IN ITS ADMINISTRATION IN ANY CONTINGENCY CREATED THEREBY.

The Court erred in holding that there is a doubt as to the validity of Section 1230, because of a supposed difficulty in determining what would be the status of the dismissed officer during the period between the time of his dismissal and his restoration under the Statute, and his status if he fails to apply for court martial. (Transcript, page 10.)

It is submitted that the situation created is not novel. In every case in which a court martial renders a verdict of dismissal of an officer, and it is approved by the officers ordering said court, the same situation exists, for under the powers conferred by the Articles of War the President may commute the sentence. If the President does commute the sentence the officer is restored to the rolls, but unless and until the President, or the reviewing authority, does approve the finding or commute the sentence, the dismissed officer is not entirely separated from the service. After the President has approved the sentence of dismissal by a court martial he has lost jurisdiction of the case, and the officer is finally separated from the service. But the status of an officer dismissed without trial is not final unless he shall fail to apply for trial by court martial within a reasonable time. The status of such an officer during the period in which he may apply for trial under Section 1230 is analagous to the status of a litigant in court where an order *nisi* has been passed, an interlocutory

decree has been rendered, or a decree final in its nature, is still in the bosom of the Court, or there is the right of appeal from a final decision of a Court. In every one of those instances the status of the litigant is not final, notwithstanding the terminology of the order or decree which may have been promulgated. Even a *permanent injunction* may be vacated. These contingencies are all well understood and exist by virtue of laws creating them, and the Statute under consideration in plain terms creates a similar situation with respect to an officer dismissed by the President without court martial. The filing of the application for trial in such case is in the nature of an appeal from the President's order, and has the same effect.

In the case of either the nomination or dismissal of an officer by the President, the result is not always the same. If Congress is in session when a nomination is made the appointee may not act at all until the Senate has confirmed the apointment. If Congress is not in session when the nomination is made the appointee may act until the Senate rejects the appointment or until the end of the next session of the Senate after the nomination was made. So in the case of the dismissal of an officer of the Army or Navy. If it is based upon the verdict of a court martial, it is final and complete when the President approves it. If it is a summary dismissal it is not final and complete until the officer allows a reasonable time to elapse without asking for a court martial, or a court martial is convened and awards dismissal or death, or the Senate concurs in the dismissal by consenting to the appointment of some other officer nominated by the President to supersede him.

The order of dismissal does not *ipso facto* separate an officer from the service—(it depends upon the circumstances under which it was issued) any more than the order of appointment, *ipso facto*, confers any authority on the appointee to act—(it depends upon whether Congress is in session). An appointee during the recess of Con-

gress may act before confirmation, and the fact that such a person has been inducted into an office implies the permanent filling of the office, but such may not be the case. The appointment ends after the end of the next session of the Senate, unless the Senate confirms.

To promulgate an order of dismissal implies that the officer affected is finally separated from his office, but such may not be the case. The Articles of War grant court martials the right to dismiss, and the orders are effective upon approval of the officer ordering the court martial, but the President may commute such a sentence.

Words do not always have the effect that their terms imply, but in all cases the courts must give to the words the meaning intended by the persons who used them, and so the mere use of the word *dismissed* does not mean final separation from the service in the Act of 1865, now Section 1230, or Article 118 of the Articles of War, because it is perfectly plain that Congress, in passing these various statutes intended that in some cases an officer dismissed might apply for court martial, and if he was refused a trial that he should be restored. The courts of justice are charged with the carrying out of these provisions and may not give the Acts of Congress a different effect than Congress intended, merely because of the novelty of the situation created; or because of the general meaning of words which are used therein. There can be no question but that Congress intended by enacting Section 1230 R. S. that an officer dismissed under such circumstances as in the present case, should have the right to apply for a trial, and that when such an application was filed as in the present case, the officer would be restored at the end of six months unless a court martial was convened to try him within said period.

4. SECTION 1230, R. S. U. S., OPERATES TO NULLIFY, UNDER CERTAIN CIRCUMSTANCES AN ORDER OF DISMISSAL.

BY THE PRESIDENT, AND IN SUCH A CASE IT IS NOT NECESSARY THAT THE DISMISSED OFFICER BE AGAIN NOMINATED AND CONFIRMED IN ORDER TO BE RESTORED TO HIS OFFICE.

Because of its error in assuming that the effect of any order of dismissal was finally to separate an officer from the service the Court below concluded that an officer summarily dismissed could regain his office only by a new appointment by and with the advice and consent of the Senate. (Transcript, page 10.) The law does not impute any such force or effect to an order of dismissal without trial. On the contrary, by the very terms of Section 1230, which is of equal force with the various articles of Section 1342, an order of dismissal by the President is void under certain circumstances. The power of summary dismissal is conferred by Article 99 of Section 1342, and the effect of summary dismissal is limited by Section 1230. The extent of a power can be none other or greater than that prescribed by the law conferring it, and it is immaterial that the law conferring the power and prescribing and limiting its effect are contained in different sections of the same body of laws.

Moreover, Congress has declared in the Act of July 29, 1868 (15 Stats. at Large, p. 125), now Section 1228 of the Revised Statutes, that

> "No officer of the Army who has been or may be dismissed from the service by the sentence of a general court martial, formally approved by the proper reviewing authority, shall ever be restored to the military service, except by a reappointment confirmed by the Senate."

This Statute, also, is subsisting law, and its very plain and obvious implication is that an officer of the Army summarily dismissed (as in the case at bar) need not be reappointed in order to be restored to his office.

Surely it cannot be seriously maintained that Congress, in granting power to the President to summarily dismiss

an officer in time of war, could not also prescribe that such an order of dismissal would be void if it was subsequently shown to be wrongful. But if the order of dismissal had the effect *instanter* of separating the accused from the service, so that he would have to be reappointed and reconfirmed in order to be reinstated, as maintained by the Court below, there would be no difference in the effect of a dismissal which is in all respects complete and one which is void.

To be sure, Section 1230, R. S., U. S., does not limit the power of the President to dismiss, but merely limits the *effect* of a summary dismissal. The Statute has no operation or force except when the President has summarily dismissed an officer of the army, but the order of dismissal has no other or greater effect than the law imputes to it. The officer is not separated from the service by the dismissal unless the dismissal, by the terms of the law, produces such a result; and there is no vacancy in the office unless, by the terms of the Statute, the officer did completely sever his relations with it; and a new appointment and confirmation are not necessary unless the officer severed his relations with the office. If the facts are such that, by the terms of the Statute, the order of dismissal by the President was *void* the effect of the said order was not to separate the officer from the service, nor to create a vacancy in the office, in which event a new appointment and confirmation are not necessary. Indeed, if the order of dismissal was void, it was of none effect, and it is as if the said order never had been issued. The word "void" as used here has no other meaning.

29 Am. and Eng. Enc. L., p. 1065, and cases cited.

Does this Court doubt the power of Congress to enact that an officer shall not be dismissed without a trial, or if dismissed without a trial his dismissal shall be void?

In Article 118 of the present Articles of War (Art. 99 of

Sec. 1342 R. S.) Congress has enacted that an officer shall not be dismissed except by Court Martial or by authority of the President, and Section 1230 R. S. provides that if an officer is dismissed by the President, he may have a trial by court martial upon the charges upon which he was dismissed if he applies for it and declares under oath that he was wrongfully dismissed. It further provides that if an accused officer is refused such trial he shall be restored as if the order had never been issued. Is there anything unconstitutional in that? On the contrary, it is directly confirmatory of the rights guaranteed by the Fifth Amendment to the Constitution.

5. AN OFFICER SUMMARILY DISMISSED BY THE PRESIDENT IS SUBJECT TO MILITARY LAW, AND THE LAW HAS PRESCRIBED THE TRIBUNAL TO TRY HIM AND PROVIDED FOR THE EXECUTION OF ITS DECISION.

Nor is there any merit in the further objection by the Court below, that the dismissal by the President would render an officer ineligible to the trial by court martial under Section 1230, R. S., U. S., because such officer would not then be amenable to military law. (Transscript, page 10.)

This objection is also based upon the assumption that the order of dismissal *ipso facto* separates an officer from the service, which we have shown above to be an error. But the objection would not be valid in any case. Davis' Military Law (cited by the Court below in support of the rule) refers to the right of a dismissed officer to a trial by court martial under Section 1230, (p. 527) and he cites an exception to the general rule on page 58. As a matter of fact, the present Statutes of the United States provide that several classes of persons who are not in the military service may be tried by courts martial. Thus:

Paragraph ("a") of Article 2 of the present Articles of

War (approved August 29, 1916) provides that in addition to those who have entered the military service "all other persons lawfully called, drafted, ordered into, or to duty, or for training in, the said service, from the dates they are required by the terms of the call, draft, or order to obey the same" are subject to military law.

Paragraph ("d") of said Article 2, provides that "all retainers to the camp and all persons accompanying or serving with the armies of the United States * * * though not otherwise subject to these articles" are subject to military law.

Paragraph ("e") of said Article 2, contemplates the trial by court martial of "all persons under sentence and adjudged by courts martial" and that would give jurisdiction to try a person while serving a sentence twenty years after he had been discharged from the military service.

Paragraph ("f") of said Article 2 confers jurisdiction to try by court martial "all persons admitted into the Regular Army Soldiers Home at Washington, D. C.," which would include any of the ex-soldiers therein who had been discharged as far back as the Civil War.

Article 32 of said Articles of War confers jurisdiction upon courts martial to punish any person, whether or not in the military service, who happens to be present at a court martial and who uses menacing words, signs or gestures in its presence.

Article 81 of said Articles of War confers jurisdiction upon courts martial to try any person, whether or not in the military service who relieves the enemy with arms, ammunition, etc., or who knowingly harbors, etc., an enemy, and this article allows a court martial to sentence such a person to death.

Article 82 of said Articles of War provides that any person whether in the military service or not who, in time of war, shall act as a spy, etc., shall be tried by General

Court Martial and upon conviction thereof suffer death.

It will thus be noted that the "general" rule is subject to several exceptions, and Section 1230 R. S. is one of such exceptions and its validity has never been questioned.

The remarks in the decision regarding the failure of Section 1230 R. S. to provide for the execution of a sentence of court martial, if convened, and the doubts of the court whether the act really means a "court martial" or "a court of inquiry," or "some other body authorized by an order of the President whose finding can go to the officer's record or make him eligible to reappointment," (Transcript, page 10) are all sufficiently answered by calling attention to the fact that it was not necessary that Section 1230 of the Revised Statutes should provide for the execution of the sentence of the court martial granted therein, since that was provided for in Section 1342 of the Revised Statutes. Further, that the "court martial," and not some other nebulous body is specified in the act to take jurisdiction of the case in the event that a dismissed officer asks for a trial. The *court martial*, is a constitutional court, established by Congress, and so is the *Court of Inquiry*, but the jurisdiction of the two is entirely dissimilar, and the scope of the jurisdiction of each is prescribed by Section 1342 R. S., which as stated elsewhere herein has been amended by the Act of Aug. 29, 1916. Congress alone, by virtue of Article III, Section 1, of the Constitution, is empowered to establish courts of the United States, and the President has no authority to constitute any of the sorts of tribunals suggested in the decision.

Ex Parte Milligan, 4 Wall, 2.

It is not deemed necessary to answer the objection of the Court below, which is based upon statements made during debate in the Senate upon the provisions of the Act of March 3, 1865, later re-enacted as Section 1230, R. S. (Transcript, page 9). So far as the application of the

statute to the facts in this case are concerned, the meaning of the statute is perfectly understandable and does not admit of two interpretations. When there is no obscurity in the effect of the law or the object aimed at by the legislature, it is not permitted for a court to inquire into the motives of the legislature in order to defeat the law itself.

Denn vs. Reid, 10 Peters, 524.

Sedgwick on Construction, p. 295.

It is considered, therefore, that there is no merit whatever in any of the objections of the Court below to either the validity or the meaning of Section 1230, Revised Statutes.

6. THE PRESIDENT ALONE HAS NO AUTHORITY TO DISMISS AN OFFICER EXCEPT SUCH AS HAS BEEN CONFERRED BY STATUTE.

The Court below erred in holding that there is any authority in the President to dismiss an officer of the army except such authority as is conferred by the Revised Statutes and Statutes enacted since such revision as shown herein. The Court held that the President has constitutional authority independent of statutes to remove officers and has cited in support of said doctrine *McElrath's Case; Ex Parte Hennen; Gratiot's Case; Mimmack's Case;* and the *Blake Case.* (Transscript, pp. 7, 8.)

It is true that the Court of Claims in its decision in *McElrath's Case* (12 C. Cl. 201) did enunciate such a doctrine, but on appeal to the Supreme Court the case was decided upon the ground that McElrath had been superseded by the appointment of his successor, by the President by and with the advice and consent of the Senate. The Supreme Court was not persuaded by the Court of Claims that the President alone had authority to dismiss independent of statute, as to which the Supreme Court stated "we express no opinion," but the Court found that the President had authority to dismiss McElrath under the

Act of July 17, 1862, which was then in force. (102 U. S., 426.) Said act was amended by the Act of March 3, 1865, now Section 1230, R. S., U. S.

There are *dicta* in the decision in the case of *Ex parte Hennen* (13 Peters, 230) to the effect that the President, as an attribute of the executive power conferred by the Constitution, is vested with the power of dismissal, but the case was decided upon another ground and one which is inconsistent with the said *dicta*. Hennen was a clerk of a United States court and had been removed by the Judge of said court, and the Supreme Court found that the judge had the power to remove the clerk under the implied power confered by the Statute Law as an incident of the judge's power of appointment. In other words, the decision establishes this simple proposition and no other; namely, that the power of removal, in the absence of all constitutional or statutory regulation, is incident to the power of appointment, which is, of course, an entirely different proposition from the doctrine that the power of removal vests in the President as an incident to his office as chief executive of the Government. In Hennen's case, under the latter theory, Hennen could not have been removed by the judge, who belongs to the judicial and not the executive branch, but the power of removal would have been vested in the President, whereas the court decided that the power of removal was in the judge.

In *Gratiot's Case* (1 Ct. Cl., 258) there are *dicta* to the effect that the President has constitutional authority to remove an officer and in support of the theory *Story on the Constitution* and not a judicial decision is cited. However, the case was decided on the ground that Gratiot had been dismissed in conformity with the Act of January 31, 1823 (*3 Stats., 723*), and the decision refers to two separate charges specified by the President under said act. More-

over, the President's order of dismissal was predicated upon said Act. It is significant that while Mr. Story enunciated the doctrine cited in the *dicta* in the Gratiot case, it would appear that he did so on the basis of statute law as it then existed with reference to civilian officers (which is considered in another part of this brief). He refers to said doctrine as "constituting the most extraordinary case in the history of the Government of a power conferred by implication in the executive by the assent of a bare majority in Congress which has not been questioned on many other occasions." (2 Commentaries, 1543.)

There is nothing said in the *Mimmack Case*, 97 U. S., 426, about the constitutional authority of the President to dismiss an officer, nor did the case involve the dismissal of an officer. The decision states that prior to July 13, 1866, the President had power to dismiss. Why that particular date? Because that is the date of the approval of an Act of Congress (*14 Stats., 92*) repealing the Act of July 17, 1862, which authorized and requested the President to dismiss officers for any reasons deemed sufficient by him. Manifestly it was true that by virtue of statutory enactment from July 17, 1862, until July 13, 1866, the President had authority to dismiss. The decision of the Court in the *Mimmack Case* was to the effect that the claimant had resigned and his resignation had been accepted and that under those circumstances the claimant was out and the President alone had no authority to restore him.

With respect to the *Blake Case* (103 U. S., 227) it should be borne in mind that that case, as well as the *Mimmack Case*, did not involve any order of dismissal. Blake resigned. His resignation was accepted and the President, by and with the advice and consent of the Senate appointed some one else to succeed him. Blake claimed that when he resigned he was insane and that for that reason his

resignation was invalid as such, but the Court held that it was not necessary to pass upon the question of the resignation inasmuch as the power of superseding an officer was by the Constitution impliedly conferred as an incident to the power of appointment, and that Blake had been superseded by the appointment, by and with the advice and consent of the Senate, of his successor. There are *dicta* in this case to the effect that the President has authority, independent of statute, to dismiss, and certain opinions of the Attorney General are cited. By an examination of the opinions of the Attorney General referred to in the Blake case it will be found that in some of them it affirmatively appears that the dismissal referred to was in conformity with the statute law then existing. In other opinions it does not affirmatively appear that the dismissal was contrary to the statute law then existing. In some cases it is not shown that the Senate did not concur in the dismissal, and in several of the said opinions the Attorney General has failed to recognize the difference between the President's full power to "nominate" and his qualified power to "appoint," and that the concurrence of the Senate is necessary in the exercise of the power of appointment of an officer of the Army.

It is not considered necessary here to analyze separately the several opinions referred to in the Blake Case. It is significant that at that late day, 1881, no judicial decision was cited in support of the doctrine, and it is believed that the value of said opinions as authority for the doctrine is minimized by the fact that when most of them were rendered the President had statutory authority (as will be shown herein) to remove an officer under certain circumstances. It is fundamental that the acts of a public officer are conclusively presumed to have been done under the law which authorized them. An examination of the following statutes will show that Congress has repeatedly legislated with reference to the power to remove an officer.

The first exercise of Congress of its constitutional power to make rules and regulations for the governing of the Army was the Act of May 30, 1796, entitled "An Act to Ascertain and Fix the Military Establishment of the U. S." (1 Stats., 483). Section 18 of said act recognized the existence of courts martial and provided that "the sentences of general courts martial, in time of peace, extending to the loss of life, the dismission of a commissioned officer, or which shall, either in time of peace or war, respect a general officer shall, with the whole of proceedings in such cases respectively, be laid before the President of the United States, who is hereby authorized to direct the same carried into execution or otherwise as he shall judge proper (485).

The first act of Congress for the government of the Navy was the Act of March 2, 1799 (1 Stats., 709), which, among other things, prescribed the punishment for certain offenses, including in Articles 39 and 43, that officers should be "cashiered" by courts martial for certain offenses.

This was followed by the Act of April 23, 1800 (2 Stats., 45), which, in article 41, provided that all sentences of courts martial extending to the dismission of a commissioned or warrant officer must first be approved by the President of the United States, and article 42 conferred upon the President power to pardon or mitigate punishment decreed by courts martial.

The Act of March 16, 1802 (2 Stats., 132), provided for the discharge of supernumerary officers and men of the military establishment, and section 10 thereof provided that the sentences of general courts martial extending to the loss of life, the dismission of a commissioned officer or which shall respect a general officer shall, with the whole of the proceedings, be laid before the President to be carried into execution or otherwise as he shall judge proper.

The Act of April 10, 1806 (2 Stats., 359), contained the

first articles of war established under the Constitution, and provided that no commissioned officer should be "discharged" from the service, but by the act of the President of the United States or by a sentence of a general court martial. This act provided that the officers should be "cashiered," in articles 14, 15, 18, 22, 23, 45, 85, 89, if sentenced by courts martial. In Articles 36 and 83 it is provided that officers might be "dismissed" by courts martial for certain offenses. But article 65 provided that in time of peace sentences of court martial, extending to the loss of life, or the dismission of a commissioned officer, or which either in time of peace or war respected a general officer, should not be carried into execution until the whole proceedings had been laid before the President for his confirmation or disapproval and orders in the case. By articles 65 and 89 the officer ordering a court martial, or the commanding officer, might carry into execution, in time of war, the sentence of a court martial extending to the loss of life or dismission of a commissioned officer, but they might suspend the execution of such sentences "until the pleasure of the President of the United States can be known."

Next, the Act of May 15, 1820 (3 Stats., 582), provided that certain officers specified (including paymasters of the Army, and Navy agents) should hold their offices for four years, "but shall be removable from office at pleasure."

Section 12 of the Act of March 2, 1821 (3 Stats., 615), provided for the "discharge" by the President of supernumerary officers.

The Act of January 31, 1823 (3 Stats., 723), provided that "every officer or agent of the United States guilty of certain specified offenses should be reported to the President "and dismissed from the public service."

The Act of August 23, 1842 (5 Stats., 512), provided for the "discharge" by the President of certain officers of the Army.

The Act of February 11, 1847 (9 Stats., 123), authorized the organization by the President of certain additional troops for and during the war with Mexico and provided for the appointment by the President of the various commissioned officers authorized in the act, and enacted that such officers be "discharged" from the service of the United States at the close of the War with Mexico.

The Act of March 3, 1847 (9 Stats., 184), provided for the appointment by the President, by and with the advice and consent of the Senate, of certain general officers to serve during the War with Mexico. Section 22 enacted that said officers should be "discharged" at the close of the War with Mexico.

The Act of June 16, 1848 (9 Stats., 335), provided that certain officers commissioned for the War with Mexico shall be "discharged" from the service upon the restoration of peace by a treaty of peace duly ratified and proclaimed.

The Act of February 28, 1855 (10 Stats., 616), provided for the "reserved" list (afterwards called "retired") list of the Navy. This act declared that officers examined and found to be incapable should be "dropped" from the rolls or placed on the "reserved" list upon the approval by the President of the report of an examining board provided for.

The Act of July 17, 1862 (12 Stats., 594), provided for the retired list of the Army and the *modus operandi* of retiring Army officers by the President upon reports of boards provided for. Section 17 of said act authorized and requested the President to "dismiss and discharge" any officer of the Army, Navy, Marine Corps, or volunteer force "for any cause which in his judgment either renders such officer unsuitable for, or whose dismission would promote, the public service.

By Section 12 of the Act of March 3, 1865 (13 Stats., 489), it was provided that "in case any officer of the military or naval service who may be hereafter dismissed by

authority of the President shall make an application in writing for a trial, setting forth under oath that he has been wrongfully and unjustly dismissed, the President shall, as soon as the necessities of the public may permit, convene a court martial to try such officer on the charges on which he was dismissed. And if such court martial shall not award dismissal or death as the punishment of such officer, the order of dismissal shall be void. And if the court martial aforesaid shall not be convened for the trial of such offense within six months from the presentation of his application for trial, the sentence of dismissal shall be void."

The act of July 13, 1866 (14 Stats., 90), expressly repealed Section 17 of the Act of July 17, 1862, *supra*, and enacted that "no officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court martial to the effect of in commutation thereof."

The Act of July 20, 1868 (15 Stats., 125), provided that no officer of the Army of the United States who has been or shall hereafter be cashiered or dismissed from the service by the sentence of a general court martial formally approved by the proper reviewing authority shall ever be restored to the military service except by a reappointment confirmed by the Senate of the United States.

The Act of July 15, 1870 (16 Stats., L., 315), provided that supernumerary officers shall be "discharged" by the President; authorized him to place on the retired list on their application any commissioned officer who had been thirty years in the service; authorized him to "muster out" of the service officers found to be unfit for service by an examining board provided for; and authorized him to "drop from the rolls" for desertion any officer absent from duty three months without leave. And also enacted that any officer on the active list accepting or exercising the functions of a civil office "shall at once cease to be an

officer of the Army and his commission shall be vacated thereby.

The Act of June 22, 1874 (18 Stats. L., 191), provided that officers of the Navy dismissed and restored under the 12th section of the Act of March 3, 1865, *supra*, shall not be paid more than six months' salary during the period of their dismissal unless they have applied for restoration as often as every six months.

The Revised Statutes of 1878 re-enacted with modifications many of the provisions of the foregoing statutes. The President may drop from the rolls for desertion an officer who is absent from duty three months without leave (Section 1229); the President may retire an officer duly found to be incapable of performing the duties of his office or who has served forty-five years as a commissioned officer or who has attained the age of sixty-two years (Sections 1244-1245). The President may dismiss for various offenses pursuant to, or in mitigation of, the sentences of court martial (Section 1342, Articles 3-6-13-14-15-18-19-26-38-54-60-61-65-99-100-106-107-111-112). In time of war the dismissal of an officer pursuant to the sentence of a court martial may be executed by the commanding general in the field (Section 1342, articles 106 and 107) except in the case of a general officer (Section 1342, article 108). But such commanding officer may suspend the sentence until the pleasure of the President is known (Section 1342, article 111). In time of peace no officer shall be dismissed except upon and in pursuance of the sentence of a court martial to that effect, or in commutation thereof (Section 1229). Any officer dismissed by authority of the President may apply for a court martial, and unless the President shall convene a court martial within six months from the filing of such application, or the court martial, if convened, shall award dismissal or death, the sentence of dismissal is void (Section 1230). But no officer dis-

missed by the sentence of a court martial formally approved by the proper reviewing authority shall be restored except by a reappointment confirmed by the Senate (Section 1228). No officer may be placed upon the retired list except upon his own application, or by reason of having attained the age of sixty-two years, or by reason of having served forty years, nor may an officer be wholly retired from the service for any reason, unless he is first given a full and fair hearing before an Army retiring board, if he demands it (Section 1253).

Since the revision of the Statutes in 1878 the President has been authorized to "drop from the rolls" any officer who has been absent in confinement in a prison or penitentiary for more than three months after final conviction by a civil court of competent jurisdiction. And it has also been provided that no officer, dropped from the rolls by reasons of absence from duty without leave (Act of 1870, *supra*), or because of such conviction shall be eligible for reappointment (Act of Jan. 19, 1911, 36 Stats. L., 894) The Act of April 25, 1914 (38 Stats. L., 347), providing for the raising of volunteer forces of the United States, enacts that officers and men composing such volunteers shall be "mustered out" of the service as soon as practicable after the President shall issue a proclamation announcing the termination of the war. The Act of June 3, 1916 (39 Stats. L., 166), provides for "provisional" appointments which, under certain circumstances, terminate after two years. The Act of August 29, 1916 (39 Stats. at L., 651), re-enacted, with some changes, Section 1342 R. S. (the Articles of War). The Act of May 18, 1917 (40 Stats. at L., 76), provided for "temporary promotions," "temporary" and "provisional" appointments, and enacts that "provisional appointments" shall terminate whenever it is determined, in the manner prescribed by the President, that the officer has not the suitability and fit-

ness requisite for permanent appointment. And the President is authorized to "discharge" any officer from the office held by him under such temporary or provisional appointment for any cause which in the judgment of the President would promote the public service; and the General commanding any Division and higher tactical organization or territorial department is authorized to appoint military boards to examine into and report upon the capacity, qualifications, conduct and efficiency of any commissioned officer within his command (other than officers of the Regular Army holding permanent or provisional commissions therein). If the reports of such boards are adverse and are approved by the President the officers shall be "discharged" at the discretion of the President.

The Revised Statutes contain provisions relating to the officers of the Navy which in a general way are similar, but are not identical, with those relating to the Army (Sections 1443-65 and 1624, R. S., U. S.). In this connection attention is particularly invited to articles 36 and 37 of said Section 1624.

So far as civil officers are concerned, the first Congress of the United States, in 1789, in acts providing for the Department of Foreign Affairs, the War Department and the Treasury Department, authorized the President to remove from office the Secretaries of said Departments. Acts July 27, Aug. 7, Sept. 2, 15, 1789, 1 Stats., pp. 28, 48, 65, 68. It has been claimed that these statutes are important as a construction by Congress of the Constitution and concede the power of removal to be in the President; but however that may be, the opinion of that Congress was of no greater force than the opinion of any other Congress and it is the courts and not Congress which are charged with the duty of construing the law. A construction by Congress is not a judicial determination.

In the Act of May 8, 1792, Congress authorized the

President to select some one to fill temporarily the offices of any of said Secretaries of Department in the event of death or because of sickness, and by the Act of July 13, 1795, this authority was extended to permit the President to appoint temporarily in cases of removal or at the expiration of the term of office (which had not been provided for in 1792). The law remained thus until the Act of March 2, 1867 (14 Stats., 430), which deprived the President of the power of removal of any civil officer appointed by and with the advice and consent of the Senate, and limited his authority to suspension during a recess of the Senate until the next session thereof. That law provided that in the event the Senate refused to consent to such suspension the officer so suspended would forthwith resume the functions of his office. That act was modified by the act of Congress approved April 5, 1869, (16 Stats., 6), which provided, as follows:

> "That every person holding any civil office to which he has been or hereafter may be appointed by and with the advice and consent of the Senate, and who shall have become duly qualified to act therein, shall be entitled to hold such office during the term for which he shall have been appointed, unless sooner removed by and with the advice and consent of the Senate, or by the appointment, with the like advice and consent, of a successor in his place, except as herein otherwise provided."

These acts were incorporated in the Revised Statutes as *Sections 1767 and 1768*, which remained the law until the Act of March 3, 1887 (24 Stats. L., 500). Since then, by the Act of August 24, 1912 (37 Stat. L., 555), Congress has enacted that no person in the classified civil service of the Government shall be removed therefrom except for cause, and requires that a person whose removal is sought shall have notice of any charges pre-

ferred against him and be allowed a reasonable time for answering the same.

A constitutional power is not limited unless by the Constitution itself. If Congress could limit, prescribe or regulate the exercise of any power granted to the President by the Constitution, it could utterly destroy that power, and its enactments, instead of the Constitution, would be the supreme law of the land. None of the many statutes referred to above has been declared to be unconstitutional, and their various provisions, prescribing, limiting, curtailing and at times altogether denying to the President the power to remove an officer, are all utterly inconsistent with any claim of constitutional power of removal in him.

There are several cases in which the President has removed civil officers, and his action was acquiesced in by the Senate, and the Courts have sustained the legality of his action. The President's order of removal in such a case is the initiation of his exercise of power in an attempt to supersede an officer, under the implied power incident to the power of appointment. Congress would initiate its attempt to accomplish the same result by impeachment proceedings. The result is finally consummated when the President and Senate concur in the appointment of the successor to said officer. It has also been stated in several decisions of this court that *in the absence of a statute*, the President has power to remove an officer. See Parsons vs. United States, 167 U. S., 324. This is true, for it is logical that the President, who takes the initial act (nomination) in the appointment of an officer, should also take the initial step in the superseding of an officer. But Congress, as shown elsewhere in this brief, has repeatedly regulated and sometimes entirely denied to the President any such provilege, which is inconsistent with any claim of power independent of congressional grant, and whatever might be the President's power, in the ab-

sence of statute, such a situation did not exist with reference to officers of the U. S. Army when the President dismissed appellant, for Section 1230, Revised Statutes, prescribed and limited his power in such a case, and under the state of facts as presented in the case at bar, the order of the President was void by the terms of the Statute.

Moreover, the dismissal of an officer of the Army is not merely a *removal* or superseding one officer by another officer. When used in connection with officers of the Army or Navy the word *dismissed* implies a punishment meted out for some offense, as contra distinguished from *discharge* which does not imply that the officer is guilty of wrongdoing. It has to do with the *punishment*, not merely the tenure of office of an officer of the Army, and hence the provision in Section 1229, that in times of peace it may not be ordered in any case except upon the sentence of a court martial, and the provision in Section 1230, that in time of war an officer summarily dismissed may have a trial by court martial before it is finally effective. It is therefore considered that to sustain the President's power to dismiss an officer of the U. S. Army the court should be satisfied that the Constitution and laws give the President the power to mete out that punishment to an officer of the U. S. Army in his discretion without any recourse to the officer. But the Articles of War do not allow such a punishment except for certain specified offenses, and the various statutory enactments referred to above are inconsistent with a claim of power in the President to even discharge an officer.

Nevertheless the various sections of the Constitution to which such a power has been referred in the decision of the court below, will now be severally examined.

7. THE PRESIDENT ALONE HAS NO CONSTITUTIONAL POWER TO DISMISS AN OFFICER AS AN INCIDENT OF THE

The Court below erred in holding that the President had such a constitutional power. (Transcript, page 7).

The contingency under which an officer may be removed from office is one of the elements which enter into the question of his tenure of office.

The only power of removal specified in the Constitution is that contained in Article I, Section 3, Clause 6, which provides that the Senate, by its verdict of guilty, may remove the President, Vice-President, or other civil or judicial or legislative officers who may be presented by the House of Representatives to the Senate for trial for impeachment.

In Section 1 of Articles II and III of the Constitution the tenure of office of the President, the Vice-President and the Judges of the United States Courts are fixed. The Constitution is silent as to the tenure of office of every other officer. The judiciary hold during good behavior, but who can determine the good and bad behavior of a judge, and who has ever attempted to do so except Congress? So far as the Constitution is concerned, the above are the only limitations upon the subject of controlling official tenure. The Constitution being silent as to all other officers, the whole power is vested in Congress to provide for both appointment and removal.

The necessity was recognized by the first Congress of providing a practicable and expeditious method of making necessary and proper changes in the personnel of civil officers. And the exercise of that power has been referred in judicial decisions to the power of appointment, where Congress has not otherwise provided.

The second clause of the second section of Article II of the Constitution provides that the President shall nominate and by and with the advice and consent of the Senate shall appoint Ambassadors * * * , Judges of the Supreme

Court and all other officers of the United States except as otherwise provided. And in the same section it is provided that Congress may vest the appointment of inferior officers in the President alone, in the courts, or in the heads of Departments; and that the President shall have power (not to make *appointments*) but to "fill up all vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of the next session."

In the first place it will be noted that so far as this clause is concerned the grant of power to the President in the matter of judicial officers is as complete as in the case of any other officers, but it has never been claimed that it conferred upon him the power to remove any judicial officers. And it will be noted that he is clothed with a qualified right to make appointments during a session of the Senate only after confirmation by that body. His only exclusive right is to fill vacancies temporarily which may happen during the recess of the Senate.

Considering this section, it is clear that the first step in the matter of appointment is given to the President to "nominate." The appointment is still inchoate. The next step is the concurrence of the Senate by confirmation and it then becomes the duty of the President to issue the commission. In the case of *Marbury vs. Madison* (*1 Cranch, 137, 156*) it is distinctly stated to be the opinion of the court (*dictum*) that the President could not withhold a commission from an officer nominated and confirmed. In some of the opinions of the Attorney General referred to in the decision in the Blake case, *supra,* there was apparently the failure to recognize the distinction between a ***nomination*** and an ***appointment.*** This section does not confer upon the President the power to *"appoint."* His exclusive power is only to nominate, and when the Senate concurs, and not till then, he is empowered to appoint, and in doing this he

exercises merely ministerial duty in carrying out the previously determined will of the two necessary parties to the appointment. In exercising the power to nominate, the President has discretionary power. In exercising the power to confirm, the Senate has discretionary power. When these two powers have been exercised, the President has no authority but to appoint, and if the power of removal is implied from this section, the concurrence of the Senate in the removal is to be implied as truly as is the power of the President, which is derived solely from his power to nominate. It is well established by judicial decisions that with the concurrence of the Senate the President may remove an officer. Some of these decisions are referred to in the decision in this case. (Transcript, page 8). In each of them it has been held that the officer was superseded where the President nominated the new appointee *vice* the incumbent removed, and the Senate concurred in the nomination, *vice* the incumbent removed.

If the power of removal is an incident of the power of appointment, the appointment cannot be revoked, or the officer be removed, but by the concurrence of the same wills that act in the appointment. The revocation must in point of authority be co-extensive with the authority that grants.

To say that one of two joint constituents can undo an act which it requires both to do, is to give one the power of both which is a contradiction in terms; for an act which requires the concurrence of two parties cannot be undone by one of them without yielding to the one the power of both, which is absurd. The Senate might as well assume to appoint without the consent of the President as the latter to appoint without the consent of the Senate. And conversely, the Senate might as well assume to remove without the consent of the President as the latter to remove without the consent of the Senate. As to officers of the Army, since they are required to be nominated by the Presi-

dent and confirmed by the Senate, it logically follows that the President might at any time nominate to the Senate a person to fill a particular office, and the Senate in the exercise of its constitutional power could confirm that nomination, and that the person so nominated and confirmed would have a right to take and enjoy the office to which he had been so appointed, and thus to dispossess the previous incumbent. It is apparent that no removal can be made unless the President takes the initiative, and hence the expression "removal by the President." It is manifest also that the power of removal is not vested in either the President or Senate or both as an independent power, but it is a consequence of the power of appointment. And as the power of appointment is not vested in the President, but only the right to make a nomination, which becomes an appointment only when the nomination has been confirmed by the Senate, the power of removal cannot be deemed an executive power solely, within the meaning of the Constitution.

The provision that the President may fill vacancies "that may happen during the recess of the Senate" and then only until the end of the next session would seem to deny him the power to fill any vacancies other than those which *happen* during a recess of the Senate. The power is to fill a vacancy, not to create one, and it is a limited power, inasmuch as, when exercised, the authority of the officer designated to fill the vacancy expires at the end of the next session of the Senate. Certainly a vacancy created by the act of the President under this grant of power could extend no longer than the term for which he could fill the vacancy created. If the Constitution had intended in this clause to grant to the President the power of removal it would have used appropriate terms and not limited the power to temporarily "fill such vacancies as may *happen*." A vacancy does not "happen" when it occurs by the act of the President. *Expressio unius est exclusio alteris.*

While it is contemplated by the Constitution that the President shall take the initial step in the removal of an officer, because he takes the initial step in the appointment of one, and the power of the Senate is to concur in or dissent from his proposed appointment or removal, it is the action of the Senate in either case which determines the status of the officer. The *crux* of a case, so far as this doctrine is concerned, is the concurrence of the Senate in the appointment or removal of an officer. In the *Blake* case (*supra*) and other cases which follow the doctrine therein enunciated, it was considered that when the President had nominated an officer, *vice* a second officer removed, and the Senate had confirmed the appointment of the officer nominated *vice* the said second officer removed, there had then been such action as warranted the court in holding that the President, by and with the advice and consent of the Senate had legally superseded the incumbent by the appointment of another officer in his stead. In the *Shurtleff* case (*supra*) the fact existed, but its significance was not recognized. In all of those cases there was the asserted intention by the President to replace a particular person in a particular office by another particular person, and the Senate concurred in the appointment of a particular person to a particular office in the place and stead of a particular person. Inasmuch as in each of those cases the Senate acquiesced in the removal of the officer who was superseded, none of the cases decides that the President *alone* could remove an officer. It is not believed that there are any cases in which the President has removed an officer (either civil or military) without the concurrence of the Senate. In a notable case President Andrew Johnson attempted to remove the Secretary of War, contrary to the will of the Senate, with the result that he was impeached by the House of Representatives and tried by the Senate, which did not remove him, but Congress did thereupon proceed to strip the Presi-

dent of all his power to remove civil officers except to *suspend* an officer during a recess of the Senate. Said restrictive provisions were embodied in the Revised Statutes as Sections 1767 and 1768, and remained the law until the act of March 3, 1887 (24 Stats. at L., 500).

Moreover, it follows logically that an officer once removed from his office cannot be returned thereto without the concurrence of the same wills which were necessary to effect the removal.

If the President alone could remove from office, he could undoubtedly revoke the removal. And this court has held more than once that an officer once completely separated from the service cannot be restored except by the same authority which is necessary for an original appointment.

Mimmack vs. United States, 97 U. S., 426.
United States vs. Corson, 114 U. S., 619.

8. AN OFFICER IS NOT SUPERSEDED WHERE, AS IN THE CASE AT BAR, THE SENATE FAILS TO CONCUR IN THE APPOINTMENT OF HIS SUCCESSOR.

The Court below erroneously held in this case that the President having ordered the dismissal of Colonel Wallace, and the Senate having concurred in the nominations of Smith and Scofield, and there being no other vacancies in the grade of Colonel, therefore it is to be assumed that Colonel Wallace was superseded by one of them, though the findings of fact show that Colonel Wallace was not even referred to in either the nomination or confirmation of Smith or Scofield, and there is no finding of fact that the Senate was even informed of the dismissal of Colonel Wallace. (Transcript, pp. 5, 8.)

While it is clear that the President and Senate may supersede an officer, independent of Section 1230, under the constitutional power of removal as incident to the power of appointment, the Court below entirely missed the vital consideration involved in the doctrine, which is that the power

of appointment being in the President and Senate, it is manifest that the President may, if the Senate concurs, remove any officer whom they jointly have the power to appoint. In this case, however, the record fails entirely to show that the Senate was ever informed that the President had removed Col. Wallace or desired its sanction to his removal, or that the Senate ever did concur in his removal, or that any one has ever been nominated or confirmed in Wallace's place. The Court states that "assuming that the effect of the appointment of Col. Smith was to displace the plaintiff." That is a very violent assumption. The President has never stated that he appointed Smith to displace Wallace, nor has the Senate ever stated that Smith was confirmed to displace Wallace.

The nominations of Smith and Scofield on March 1, 1918, were merely to be Colonels, Quartermaster Corps. The validity of those nominations depends upon the fact that there were two vacancies. **The nominations did not specify any particular vacancies and did not aid in any way in creating any vacancies.** Who can say which of the two men was nominated to succeed Colonel Wallace? And if it is not shown which one was to succeed him, how can it be maintained that either one of them was nomniated to succeed him? There is no finding of fact that the Senate knew that either Smith or Scofield was nominated to succeed Colonel Wallace, or that the Senate knew that the President had dismissed Colonel Wallace or that the Senate concurred in the dismissal of Colonel Wallace or that the Senate consented to any appointment in his place or stead.

We may assume that when Smith and Scofield were nominated, it was not known by the President whether or not Colonel Wallace would apply for a trial by court martial, and the failure to nominate any officer **vice Hamilton**

S. Wallace, dismissed, may have been for the reason that it was known that he was entitled to a reasonable time within which to exercise his statutory right to apply for trial by court martial. In the event that his dismissal was not accomplished there would have been only a temporary excess of Colonels until the next vacancy occurred—in that grade. Such a situation is not unique, and does not in any event affect the status of the *de jure* officer, who, in this case was Colonel Wallace. The supernumerary officer is a *de facto* officer during such period.

Quackenbush vs. United States, 177 U. S., 20.

Rasmussen vs. Commissioners, 45 L. R. A., 295.

Moreover, it was not until February 5, 1919, six months after Colonel Wallace had been refused a court martial, that he was entitled to be restored to his office, and there is no finding of fact here that the complement of Colonels was full at that time. Several vacancies may have occurred between the time of the appointment of Smith and Scofield and the date when the order of dismissal of Colonel Wallace became void under the Statute.

9. NOR HAS THE PRESIDENT ANY IMPLIED AUTHORITY TO DISMISS AN OWNER UNDER HIS CONSTITUTIONAL POWER AS CHIEF EXECUTIVE.

The decision of the Court below quotes from an opinion of Judge Loring in *McElrath's Case* (12 C. Cls., 201) to the effect that in addition to the constitutional power of removal as incident to the power of appointment, the Presiden has power to remove as an "attribute of the executive power belonging to his office." (Transcript, page 7.)

Article II, Section 1, Clause 1, of the Constitution provides that "the executive power shall be vested in the President," and Section 3 of the same article provides that he "shall take care that the laws be faithfully executed." However, if his power and duty to execute the law includes

the power to remove an officer, why does it not also include the power to create an office? He cannot add a soldier to the Army or a messenger to his office unless the power is conferred upon him by Congress. Yet he cannot execute the laws without soldiers and assistants. **His general power to execute is subordinate to his duty to use only those agencies and methods prescribed for him by Congress, which in Article 1, Section 6, Clause 18, of the Constitution is clothed with the power to provide means for the exercise of all the powers conferred by the Constitution upon the executive and judicial branches of the Government as well as upon the legislative branch.**

(See *McCulloch vs. State of Maryland*, 4 Wheat., 316, 409, 420.)

Moreover, we are met at once by the fact that there is in the Constitution a provision for the removal of the executive officers for cause, but it is vested in the House of Representatives and Senate by impeachment, and is not vested in the President. Certainly if it had been intended to give arbitrary power to the President to remove officers without cause, the power to remove for cause would also have been lodged in him. It is clear that the Constitution conferred upon Congress the power of controlling executive appointments and though the judicial branch was clothed with power to adjudicate all other questions arising under the Constitution, the question whether an officer of the United States should be removed from his office for malfeasance or misfeasance was referred to neither the executive nor the judicial branch, but to the Senate, which is thereby constituted a court. And its power is not limited, even to the removal of the Chief Executive of the nation. It may therefore be concluded that there is no *implied* power to be derived from the power to execute the law. And so far as we have been able to discover there has never arisen a case in which the President has suc-

ceeded in removing an officer contrary to the will of the Senate.

10. NOR HAS THE PRESIDENT AUTHORITY TO DISMISS AN OFFICER BECAUSE OF THE TERMS OF THE COMMISSION ISSUED TO SUCH OFFICER.

The Court erred in holding that the President could remove Col. Wallace because claimant's commission ran "To continue in force during the pleasure of the President for the time being." (Transcript, page 7.)

The form of commission to be issued under the Constitution has never been prescribed. Under the power of appointment the initial step in superseding an officer must be taken by the President because the power of nominating the successor is conferred upon him and only the power of concurrence is conferred upon the Senate. Therefore, so far as we have been able to discover, all commissions issued under the Constitution to Presidential appointees have been in the form issued to this claimant, except those issued to the judiciary, those issued in cases where the Congress prescribed the tenure of an office to be for a term of years, and certain commissions to civil officers following the enactment of the Act of March 2, 1867 (*supra*).

The law under which the appointment is made, and not the commission, determines the tenure of office. Nor should the commission of an officer be confused with the appointment itself, for it has been held that the commission is only evidence of the appointment and that it is possible to appoint an officer without issuing any commission. If the commission controlled, then the officer would be entitled to his office notwithstanding his removal by the Senate under its power of impeachment, and the President might by appropriate terms in the commission change the tenure of an office and prevent the removal of an officer by his successor and the Senate even by impeachment. The

propriety of commissioning an officer during the pleasure of the President has never been objected to, nor has it been held by the Supreme Court that it controlled.

To hold otherwise would make the commission superior to the law under which the commission is issued.

Marbury vs. Madison, 1 Cranch, 137.
United States vs. Kirkpatrick, 9 Wheaton, 720.
United States vs. LeBaron, 19 Howard, 74.

11. NOR HAS THE PRESIDENT ANY AUTHORITY TO DISMISS AN OFFICER BY VIRTUE OF HIS CONSTITUTIONAL RELATION OF COMMANDER-IN-CHIEF OF THE ARMY.

There is only one other power conferred upon the President by the Constitution, to which could be referred any implied authority to remove an officer of the Army, and that is his power as Commander-in-Chief of the Army and Navy under Article II, Section 2, Clause 1. Attorney General Legare (*4 Opp. Atty. Gen., page 1*) refers to this supposed implied power in an opinion quoted with approval in certain *dictum* in the *Blake case, supra.* But while Attorney General Legare was of the opinion that such a power existed, he did not approve of it at all as shown by the following from said opinion:

> "That the power is a tremendous one, and that, if tyrannically exercised, none can be imagined more intolerable and more revolting to a free people are propositions which all will admit. That brave and honorable men, such as alone are worthy of a military commission, should be subjected to a capricious despotism, which may not only deprive them of their profession, but even sully their good names, must be felt to be a case of very peculiar hardship. Yet these considerations have not prevented nations jealous of their rights, and earnest in upholding and enforcing their laws against all prerogatives from acknowledging the necessity of such a power in the Commander-in-Chief

of their Army and Navy."

It must be a source of gratification and satisfaction to this Court that there is not a single decision of a court of the United States in which the power of the President as Commander-in-Chief, or otherwise, to remove an officer of the Army or Navy, contrary to the expressed wish of the Senate, has been drawn in question, and manifestly if the Senate concurs in the removal of an officer by the President, as has frequently happened, the cause is at once removed from the class of acts which are to be referred to the exercise of power by the President alone. Attorney General Legare apparently overlooked the Fifth Amendment of the Constitution and the acts of Congress establishing courts martial and prescribing for what offenses officers of the Army and Navy might be removed from their offices, and limiting and prescribing the power of the Commander-in-Chief along with every other officer of the Army and Navy, in the punishment of those engaged in the military and naval service. Every act of Congress limiting the removal of officers is either unconstitutional or the President as Commander-in-Chief has no such implied constitutional power.

Moreover, it is for Congress to decide, in the first place, whether there shall be an Army or Navy, and the President must command the Army or Navy as it is created by Congress, and subject, as is every other officer of the Army and Navy, to such rules and regulations as Congress may from time to time establish.

If the Commander-in-Chief of the Army and Navy had the power to remove, at pleasure, officers of the military and naval service, it would in effect make those organizations creatures of his will, and it would swallow up and overshadow all the power expressly conferred upon him. The possibilities involved in the exercise of such power would be greater and more dangerous than all of the execu-

tive authority expressly granted to the President by the Constitution. But as a matter of fact, the Commander-in-Chief cannot transfer an officer of the Army to the Navy, promote or retire an officer, nor add a soldier to the Army or a sailor to the Navy. He may not increase nor decrease the compensation paid to any one in either branch by virture of any of his authority as Commander-in-Chief. In 1862, when a very large proportion of the officers of the Army and Navy were disloyal and the very integrity of the United States was thereby threatened, Congress authorized the President to dismiss officers from the Army for any reason deemed sufficient by him, **but before that war was over the power was withdrawn from him** and it was never conferred upon him during any other period of the country's history since the adoption of the Constitution.

11. Conclusion.

It follows from the foregoing that the Court erred in its opinion that Section 1230, R. S., does not affect the office held by the dismissed officer or entitle him to its emoluments, and in its conclusion of law that the claimant is not entitled to recover and his petition ought to be dismissed.

Section 1230 relates exclusively to the office and emoluments of office in cases within its purview, and we have shown above that the case of appellant is completely covered by the statute. Indeed the statute admits of no construction which applied to the facts in this case would result otherwise than in restoring the appellant to his office and the emoluments thereof.

The decision of the Court, therefore, must be in favor of the appellant and he is entitled to a judgment for the amount set forth in his claim as found in finding of fact number VII.

This case is analogous to those cases in which officers have for any reason been illegally removed. As appellant's dismissal was void, he has never been lawfully removed,

and it follows that he is entitled to the salary of his office. The authorities are numerous and harmonious on this point.

United States vs. Wickersham, 201 U. S., 390.
United States vs. Redgrave, 116 U. S., 474.
United States vs. Perkins, 116 U. S., 483.
Beuhring vs. United States, 45 Ct. Cl., 404.
Lellman vs. United States, 37 Ct. Cl., 128.
Fitzsimmons vs. City of Brooklyn, 102 N. Y., 536.
Garvey vs. City of Lowell, 199 Mass., 47.
Rasmussen vs. Commissioners, 45 L. R. A., 295.

Respectfully submitted,

FRANK S. BRIGHT,
H. STANLEY HINRICHS,
Attorneys for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 118.

HAMILTON S. WALLACE, *Appellant*,

v.

THE UNITED STATES, *Appellee*.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR APPELLANT.

In answer to the brief of the United States in the above entitled cause appellant begs to submit the following reply brief.

The first point set up by the United States is that—

> "SECTION 1230, REVISED STATUTES, DOES NOT APPLY TO THE CLAIMANT'S DISMISSAL."

The argument of the Government in support of said point is to the effect that—

"a. The section does not apply to an officer dismissed by the action of the President in appointing, with the approval of the Senate, his successor."

"b. The President, with the approval of the Senate, appointed an officer to supersede the claimant."

Answering the first contention of the Government, appellant contends—

That while, as stated in the opening paragraph of the Government's argument it has been recognized that the power of removal of federal officers is incident to the power of appointing them, and that the President can, with the consent of the Senate, remove officers whom the Constitution authorizes him to appoint with the consent of that body, it must appear in such a case that the Senate concurred in the removal and it has never been held that the President, with the consent of the Senate, can *dismiss* an officer of the Army by superseding him in the manner stated.

There is a wide distinction, which is well recognized in military law, between a mere removal of an officer and the dismissal of an officer. When an officer resigns, is entirely retired, or dropped from the rolls, he is "discharged" and there are three kinds of discharges known to military law, namely, "honorable discharges," "discharges without honor" and "dishonorable discharges." (Digest of Opinions of Judge Advocate General, 116-117.)

The "dismissal" of an officer, on the other hand, implies punishment, and such action should be taken in those cases only in which an officer is charged with an offense on which it would be proper to try him by general court martial.

In military usage the words "dismissal" and "discharge" have entirely separate and distinct meanings. A

person may be honorably discharged but cannot be honorably dismissed, for the word dismissal implies a dishonorable separation from the service. (Source-Book of Military Law and Wartime Legislation, pp. 731-4, 751-4, 763-7. Also 2 Ops. J. A. G., 889-90.)

An examination of the Articles of War will demonstrate beyond the shadow of a doubt that the dismissal of an officer of the Army is a penalty for an offense. In this country we do not punish people without trials and without offering the accused an opportunity to show his innocence. In the case at bar appellant was dismissed out of hand by the President, without having been informed even of the nature of the charges against him, and within three weeks thereafter the President appointed an officer to be Colonel with the intention, so it is alleged, of superseding appellant, and if the confirmation by the Senate of the unjust punishment was secured it was accomplished without the knowledge by the Senate that any one was being punished or even who was being superseded, because the nomination of the officer who is alleged to have superseded appellant did not in any way mention the appellant or make any reference by which he could be identified as the officer who was being succeeded.

In the Government's brief the fact is ignored that the appellant was not merely superseded or removed but was *dismissed*, though the appellant had urged the point, not only in the court below, but in his initial brief. The Government's brief would seem to contend that "removal" is synonomous with "dismissal." In support of its contention it declares that in four cases it has been held by this Court that the act of the President in appointing, with the consent of the Senate, a new officer in place of one already in the service *dismisses* the latter from the posi-

tion which he held. Not a single one of the four cases, however, is in point.

In the McElrath case (cited in the brief) the claimant, an officer in the Marine Corps, was dismissed for desertion, in time of war, by the Secretary of the Navy. The claimant had attempted to resign and acquiesced in his dismissal for more than six years. He never did apply for a court martial upon the charges on which he was dismissed. He made application to the Department for the revocation and annulment of the order of dismissal, six years after said order was issued, and the President issued an order restoring him to the rolls. He sued for his salary from the date of dismissal to the date of restoration, and the United States denied any indebtedness and asserted a counter claim for the money paid him since his restoration by the President.

The Court held that he had been removed by the nomination by the President of George B. Haycock to be first lieutenant *vice* Thomas L. McElrath dismissed; that:

> "The nomination and confirmation subsequently of Lieutenant Haycock, followed by his commission as First Lieutenant in the Marine Corps in place of Lieutenant McElrath, as certainly operated under the law as it then was to remove the latter from the service as if he had been dismissed by direct order of the President under his own signature. This, because, as is conceded, the President, at the time he asked the advice and consent of the Senate to the nomination of Lieut. Haycock in place of Lieut. McElrath, had the power to dismiss the latter, summarily, from the service. That power, if not possessed in time of war by the President, in virtue of his constitutional relations to the Army and Navy, and as to that question we express no opinion, was given by an Act of Congress approved July 17, 1862."

It would therefore seem that the Supreme Court decided that the President had power to dismiss McElrath, but aside from that he had been removed by the nomination and confirmation of his successor in office.

In the case of Blake v. U. S., 103 U. S., *227*, the facts were that the President received and accepted what purported to be a resignation of Blake and nominated "Alexander Gilmore of New Jersey, *vice* Blake resigned." Subsequently, it was determined by the War Department that Blake was insane when he submitted his resignation and he was restored to his office. He sued for his salary from the time of the acceptance of his resignation until the date of his restoration and the Court held that the

> "appointment of Gilmore with the advice and consent of the Senate, to the office held by Blake, operated in law to supersede the latter, who, thereby, in virtue of the new appointment, ceased to be an officer in the Army from and after, at least the date at which that appointment took effect, and this without reference to Blake's mental capacity to understand what was a resignation."

In the case of Keyes v. U. S., 109 U. S., 336, the facts were that Keyes was dismissed by sentence of General Court Martial which was approved by the President. Therefore the case in no way refers to the power of the President to summarily dismiss an officer. Four months after the dismissal of Keyes the President nominated Goldman to the Senate for appointment as 2nd Lieut. in said Regiment *in the place of Keyes dismissed.* The Senate confirmed the appointment and then Keyes sued for his salary from the time of his dismissal on the ground that the Court Martial had no jurisdiction to try him because one of its members, Colonel Merritt, was prosecutor and witness and also one of the judges who ren-

dered the verdict and sentence. The Supreme Court held that Keyes, having acquiesced in the proceedings, the judgment could not be attacked collaterally in the manner attempted. The Court cites with approval the case of Blake v. U. S. upon the point—

> "That the President has the power to supersede or remove an officer of the Army by the appointment of another in his place, by and with the advice and consent of the Senate, and that such power was not withdrawn by the provisions in Section 5 of the Act of July 13, 1866, c. 176, (14 St. at Large 92), now embodied in Section 1229 R. S."
>
> In the case of Mullan v. U. S., 140 U. S., 240, the facts were that Mullan was dismissed by sentence of court martial, approved by the President. Six months thereafter the President nominated "Lieut. Commander Francis M Green to be Commander in the Navy from the 7th of July, 1883, *vice* Commanders T. H. Eastman, retired, and Horace E. Mullan, dismissed."

The Senate confirmed the nomination and subsequently Mullan sued for his salary, contending that the court martial was an illegal tribunal, because of the seven members participating in the trial five were his juniors in rank. The Court held that under the law—

> "The sentence of the court martial and its approval by the President cannot be regarded as void."

but the Court goes on to state that aside from the legal character of the court martial, under the doctrine enunciated in the Blake and Keyes cases, the nomination of Green by and with the advice and consent of the Senate, and his commission in place of Mullan,

> "put Mullan out of the Navy, even if the proceedings of the court martial had been void."

This case has no bearing upon the President's right of dismissal.

In each of these four cases it will be noted that one officer was nominated vice another officer, whose name was given and the Senate was informed that he had "resigned" or been "dismissed" as the case might be. In confirming the nomination, the Senate, in each case, concurred in the removal of the officer who was superseded.

In the case at bar, the most that can be contended by the Government is that the President *intended* that the office held by the appellant was to be filled by Smith, who was named as Colonel on the day immediately following the order of dismissal of appellant, and it is contended in the Government's brief that—

> "This result is not affected by the fact that the Senate, when it approved the appointment of Lieut. Col. Smith as Colonel in the Quartermaster Corps, was not informed that this officer was nominated to replace the claimant. Since under the Constitution the President alone has the power to make nominations, he alone has the power to determine their nature and character. When the Senate approves a nominee for appointment made by the President, the resulting appointment has the nature and character of the President's original nomination and is not affected by the Senate's knowledge or lack of knowledge of its nature or character." (P. 7-8.)

Such a contention is absurd.

In the case at bar we can only infer the President's intention that Smith was to supersede the appellant, by the face that appellant had been dismissed the day before the date on which Smith's appointment was to be effective and that the complement of officers was full, unless this dismissal created a vacancy, but are we to assume that

the President deliberately intended to prevent appellant from having any opportunity whatever to apply for a court martial under Section 1230 R. S. and, if so, did he not attempt to nullify the Act of Congress?

Such seems to be the logical conclusion from the brief of the Government, but we have every confidence that this Court will not stamp such a proceeding with its approval.

The second point urged in the brief for the United States is that "THE CLAIMANT WAIVED HIS RIGHTS UNDER SECTION 1230 BY HIS DELAY IN APPLYING FOR TRIAL." The brief concedes the fact that the dismissed officer is entitled under the Act to some time within which to apply for a Court Martial. The Solicitor General states that "Since delay beyond a period of two or three weeks could be of no advantage to the claimant and since a greater delay was such as would, and in fact, did, prejudice the Government, the claimant must be held to have so far acquiesced in his dismissal that he cannot now invoke in his behalf the provisions of Section 1230."

Why two or three weeks? Because in less than three weeks after the issuance of the order dismissing the claimant from the service, the President nominated Smith (who it is alleged superseded him,) and in less than four weeks after the issuance of the order of dismissal the nomination of Smith had been confirmed; and, therefore, the Solicitor General could not concede to this appellant four weeks within which to apply for trial without admitting that the appellant had not had reasonable time within which to exercise his right to apply for Court Martial.

Section 1230 does not limit the time within which a dismissed officer may be entitled to apply for the Court

Martial provided for. There is no regulation of the War Department which prescribes any limit. The order dismissing the appellant did not notify him of any time within which he should exercise his right to apply for Court Martial. The only adjudicated case in which the question has been referred to by any court of the United States is the case of *Newton vs. United States, 18 Court of Claims, 435.* It was there held that "an officer irregularly or wrongfully dropped from the rolls should demand his restoration or make application for Court Martial within a reasonable time * * * In this case the claimant waited nine years before making his application. During all this time he did not report himself to the Department, neither rendered nor offered to render any service, made no claim to the office for pay, and now gives no good reason for his long silence. Under these circumstances, in our opinion, the law should presume acquiescence." And see 15 Opp. Atty. Gen., 569.

The original statute (Section 12 of Act of March 3, 1865, 13 slats. p. 439) applies to both the Army and the Navy. In the revision of 1878, the statute as applied to the Army was enacted as Section 1230, Revised Statutes, and as applied to the Navy it was enacted as Article 37 of Section 1624, Revised Statutes. Said Article 37 clearly contemplates that an application for a Court Martial by a dismissed officer of the Navy may be made at any time. Its language is: "When any officer, dismissed by order of the President since March 3, 1865, makes, in writing, an application for trial, setting forth, under oath, that he has been wrongfully dismissed," etc. Considering the fact that said provision when enacted stretched back from 1878 to 1865, and contains no limitations as to future cases, and that it is otherwise identical with Section 1230 Revised Statutes; considering also that there is

no apparent reason why Congress should have granted an officer in the Navy the right to apply for Court Martial after he had been dismissed any time subsequent to March 3, 1865, but an officer dismissed from the Army should not have at least thirty days within which to apply; it would seem clear that the construction sought to be placed upon Section 1230, Revised Statutes, by the Solicitor General in his brief is hardly warranted. There is no difference between Section 1230, Revised Statutes, and Article 37 of Section 1624, Revised Statutes, except that one statute applies to the Army and the other applies to the Navy. In one section the intention is clearly expressed, and the other section expresses no contrary intention, and we submit that Congress did not evince a disposition to restrict the right of an officer dismissed from the Army to apply for a Court Martial therein provided within three weeks, nor intend that an officer should be deprived of his rights if his application for a Court Martial is filed within a reasonable time. Of course, what is reasonable is to be judged from the circumstances in each case. The statute allows the President six months from the time of the filing of the application within which to convene a Court Martial, if one is to be ordered under the statute. There would seem to be no reason why the claimant should not have at least the same length of time in which to apply for a Court Martial. Moreover, in the case at bar the records show that the claimant was not even informed of the charges upon which he was dismissed and to apply for a Court Martial immediately, as suggested by the Solicitor General, practically meant that he had to be ready without time for preparation, to defend his entire record before a foe in ambush, because the Government at the proposed trial could select any charge whatever upon which to try him. He had not been informed as to the charge on which he had been dis-

missed. Under such circumstances, it would seem that the claimant should have a reasonable time within which to attempt to ascertain upon what charges he would be tried if he asked for a Court Martial. However, the claimant applied for a Court Martial before the expiration of six months from the date of his dismissal and he has shown a satisfactory reason for his failure to apply for a Court Martial at an earlier date. In finding of fact No. 5 of the Court of Claims, it is found that prior to June 14, 1918, the appellant had been advised that he could seek relief through Congress, and until that date he had no actual knowledge of his rights under Section 1230, Revised Statutes; that on the date that he learned of said statute he made application for trial by Court Martial which was an informal application and on July 16th he made a valid application under the Act. The last application was made less than six months after his dismissal. Certainly the claimant moved with the utmost speed, and it is significant that in the Court below the Government raised no objection to the claimant's application for Court Martial under Section 1230 on the ground that it was not seasonably made.

The third point urged in the brief for the United States is that "SECTION 1230 DOES NOT GIVE AN OFFICER DISMISSED BY THE PRESIDENT ANY RIGHT TO PAY AFTER HIS DISMISSAL," and the argument proceeds upon the theory that the application for a Court Martial under Section 1230 by a dismissed officer, nullifies the dismissal and therefore the said statute is inconsistent with Article 118 of the Act of August 29, 1916.

The action of the President dismissing the officer is not nullified under Section 1230, Revised Statutes, unless the President shall refuse to grant the Court Martial ap-

plied for, or the Court Martial convened in pursuance to the statute shall fail to award a sentence of death or dismissal; then, in either one of these events, the statute provides that the order of dismissal by the President shall be void.

There is no inconsistency whatever between Section 1230, Revised Statutes, and Article 118 or Act of August 29, 1916, but if there was, then said inconsistency existed from the time of the enactment of Section 1230, because the language of said Section 118 in so far as it relates to this matter is identical in terms with the language of Article 99 of Section 1342 enacted at the same time as Section 1230. As the language of Section 99 of Section 1342, Revised Statutes, did not render nugatory the provisions of Section 1230 enacted at the same time, the same language re-enacted at a later date could have no greater or different affect than in the original statute. Moreover, the Act of August 29, 1916, purports to amend only Section 1342 of the Revised Statutes (See Section 3) and the amendment of Section 99 of Section 1342 (in so far as it relates to this matter) consists in changing the number of said Article from 99 to 118.

Defendant's brief states that Congress intended by enacting Section 1230, Revised Statutes, to restore an officer to his former office if the order dismissing him was revoked, but that inasmuch as this Court has held that a dismissed officer has the same status as one who has never been in the military service and that he can regain his position only in the manner provided for appointment to office, it therefore follows that Section 1230 was ineffective.

The fallacy of the argument lies in the fact that this Court has never held that "a dismissed officer has the same status as one who has never been in the military

service." It has held that where an officer has been entirely separated from the service he cannot be restored to his office except by a new appointment and confirmation, which is correct. The effect of Section 1230, Revised Statutes, is to limit the scope of a summary dismissal by the President and under said Section an order of dismissal by the President does not *ipso facto* separate an officer from the service. None of the cases referred to in the defendant's brief are in point; not one of them has any bearing whatever upon the effect of a dismissal by the President in view of Section 1230, Revised Statutes. Our contention is that Congress was within its power in enacting Section 1230, Revised Statutes, that said statute cannot be fairly construed without holding that the order of the President dismissing the appellant is void by virtue of said statute, and if the appellant's dismissal was void, he has never been lawfully removed from his office and it follows that he is entitled to the salary of his office. We have cited numerous decisions which are harmonious on that point on Page 46 of our initial brief.

Respectfully submitted,

FRANK S. BRIGHT,
H. STANLEY HINRICHS,
Attorneys for Appellant.

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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

HAMILTON S. WALLACE, APPELLANT
v.
THE UNITED STATES, APPELLEE. } No. 118.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is an appeal from the judgment of the Court of Claims dismissing the petition of the claimant brought to recover the pay and allowances of colonel of the Quartermaster Corps of the United States Army for the period from February 13, 1918 to March 12, 1919, amounting to $6,508.71. (Finding, VII.)

The claimant was duly commissioned as colonel in the United States Army on April 26, 1912, and he served as such an officer and received the pay of this office until February 13, 1918. (Findings I and III.) On February 13, 1918, in time of war, the claimant was notified that the President had, by General Orders No. 17, dated February 13, 1918, dismissed claimant from the service. (Finding IV.)

On March 1, 1918, the President nominated to the Senate as colonels in the Quartermaster Corps of the Army—

> Lt. Col. Robert S. Smith, Quartermaster Corps, with rank from February 14, 1918.
>
> Lt. Col. Richmond McA. Schofield, Quartermaster Corps, with rank from February 23, 1918.

These officers were confirmed by the Senate on March 8, 1918, and their appointment filled the complement of twenty-one (21) colonels which the law authorized in the Quartermaster Corps. (Finding IV; sec. 9 act of June 3, 1916, 39 Stat. 166.)

On July 16, 1918, the claimant made application in writing for trial by court-martial on the ground that he had been wrongfully dismissed from the service. This application was received by The Adjutant General of the Army on August 5, 1918. On September 14, 1918, the claimant's application for trial was refused by the Secretary of War and the claimant was so informed. No court-martial has been convened at any time to try the claimant upon the charges upon which he was dismissed. (Finding V.)

The claimant's petition rests upon the theory that his dismissal by the President was rendered void by virtue of the provisions of section 1230, Revised Statutes, which section is taken from section 12 of the act of March 3, 1865, 13 Stat. 489. Section 1230 provides:

> When any officer, dismissed by order of the President, makes, in writing, an application for trial, setting forth, under oath, that he has been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court-martial, to try such officer on the charges on which he shall have been dismissed. And if a court-martial is not so convened within six months from the presentation of such application for trial, or if such court, being convened, does not award dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void.

As an answer to the position of the claimant, the contentions of the Government are:

(1) That the claimant was dismissed by the action of the President in appointing, with the approval of the Senate, an officer to supersede him, and section 1230, Revised Statutes, does not apply to such a dismissal.

(2) That even if the claimant's dismissal was subject to the provisions of section 1230, the claimant waived his rights under that section by his delay in applying for trial by court-martial.

(3) That even where section 1230 is applicable, it does not give an officer dismissed by the President any right to pay after the date of his dismissal.

ARGUMENT.

I.

Section 1230, Revised Statutes, does not apply to the claimant's dismissal.

A. *The section does not apply to an officer dismissed by the action of the President in appointing, with the approval of the Senate, his successor.*

From a very early date it has been recognized that the power of removing Federal officers is incident to the power of appointing them, and that the President can, with the consent of the Senate, remove officers whom the Constitution authorizes him to appoint with the consent of that body. (*Ex Parte Hennen*, 13 Pet. 230, 259.)

In *McElrath* v. *United States*, 102 U. S. 426, this court squarely held that the act of the President in appointing, with the consent of the Senate, a new officer in place of one already in the service, dismissed the latter from the position which he held. This decision was followed in *Blake* v. *United States*, 103 U. S. 227; *Keyes* v. *United States*, 109 U. S. 336; *Mullan* v. *United States*, 140 U. S. 240. In *Blake* v. *United States* the court said, p. 237:

> It results that the appointment of Gilmore, with the advice and consent of the Senate, to the office held by Blake, operated in law to supersede the latter, who thereby, in virtue of the new appointment, ceased to be an officer in the Army from and after, at least, the date at which that appointment took effect—and this, without reference to Blake's

> mental capacity to understand what was a resignation.

In *Blake* v. *United States*, *supra*, the question was whether, in view of the provisions of section 5 of the act of July 13, 1866, 14 Stat. 92, an officer could be dismissed from the Army in time of peace by th action of the President and the Senate in appointing an officer to supersede him. Section 5 provides:

> And no officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof.

Although the above section, which became section 1229 of the Revised Statutes, prohibits *any* dismissal in time of peace except through the action of a court-martial, the court interpreted it as prohibiting only dismissals made by the President acting alone by virtue of his Executive power, and not as prohibiting dismissals made by him acting jointly with the Senate in the exercise of their constitutional power of appointment. The language of section 1230 of the Revised Statutes is much less broad than the above act of 1866 in that it applies solely to officers dismissed "by order of the President." There is even more reason for construing it as not applying to dismissals made by the President and the Senate acting jointly in the exercise of their constitutional power of appointment than there was in giving this construction to the act before the court in the Blake case. The claimant, moreover, concedes that section 1230 does not apply to such dismissals. (Brief, p. 38.)

The claimant bases his right to recover in the present action solely on the provisions of section 1230, by virtue of which, he contends, his dismissal by the President has become void. If, however, the claimant was dismissed from the Army by the joint action of the President and the Senate in superseding him, section 1230 does not apply to his dismissal and there is no basis for the present suit.

B. *The President, with the approval of the Senate, appointed an officer to supersede the claimant.*

The claimant has made the point (Brief, pp. 38–40) that it does not appear that the President and the Senate appointed any officer to supersede him. The facts show, however, that Lt. Col. Robert S. Smith was appointed to supersede the claimant. On March 1, 1918, the President nominated two officers to be colonels in the Quartermaster Corps of the Army. One of these officers was nominated to rank from February 23, 1918, and the other, Lt. Col. Smith, was nominated to rank from February 14, 1918. (Finding IV.) The date from which this nominee was to rank coincides with the date of the claimant's dismissal, and clearly indicates that he was nominated to replace the claimant.

Further evidence of this is furnished by the fact that on March 1, 1918, when the President nominated two officers to be colonels in the Quartermaster Corps there was only one vacancy in this position outside of the office made vacant by the dismissal of the claimant. Since the President had no authority to add to the number of colonels

authorized by law in the Quartermaster Corps (*Montgomery* v. *United States*, 5 Ct. Cl. 93, 98), it is necessary to hold, either that the President intended one of the two nominees for colonel to replace the claimant, or that he was unlawfully attempting to add to the number of colonels authorized by law.

The President having nominated Lt. Col. Robert S. Smith to replace the claimant and the Senate having confirmed the nomination, the appointment of this officer superseded the claimant and dismissed him from office. This result is not affected by the fact that the Senate, when it approved the appointment of Lt. Col. Smith as colonel in the Quartermaster Corps, was not informed that this officer was nominated to replace the claimant. Since under the Constitution the President alone has the power to make nominations, he alone has the power to determine their nature and character. When the Senate approves a nominee for appointment made by the President the resulting appointment has the nature and character of the President's original nomination and is not affected by the Senate's knowledge or lack of knowledge of its nature or character.

The respective functions of the President and Senate relative to appointments are discussed by Attorney General Butler in 3 Op. A. G. 188. The President had nominated John R. Coxe to be a lieutenant in the Navy and the Senate had approved the appointment with the added proviso, "to take rank next after Lt. Elisha Peck." The Attorney General held that under these circumstances John R.

Coxe could not be commissioned as a lieutenant in the Navy. He could not be commissioned so as to rank as lieutenant from the date of his appointment since the President's nomination in this form had not been approved by the Senate. He could not be commissioned to rank next after Lt. Peck, since commissioning him in this manner would involve an appointment which would have originated with the Senate. The Attorney General in regard to such a commission said (pp. 189, 190):

> The Senate has no power to originate an appointment; its constitutional action is confined to a simple affirmation or rejection of the President's nomination. * * * This, however, would involve the irregularity of making the Senate, so far as regards the date of rank, the proposers of the measure, thus reversing the order of action prescribed by the Constitution.

It has been squarely held by this court that when an officer is dismissed from the Army by the appointment of a successor, the dismissal dates, not from the date of the nomination of the successor or from the date of confirmation of the nomination by the Senate, but from the date from which the successor was nominated to rank. (*McElrath* v. *United States*, *supra*; *Blake* v. *United States*, *supra*, p. 237; *Keyes* v. *United States*, *supra*, p. 339.)

Lt. Col. Robert S. Smith was nominated to rank as colonel from February 14, 1918. In the present action claimant seeks to recover pay as colonel from February 13, 1918, to March 12, 1919. It follows

that if the claimant was superseded by the appointment of Robert S. Smith as colonel, he is not entitled to recover anything in the present action.

II.

The claimant waived his rights under section 1230 by his delay in applying for trial.

Section 1230 permits officers dismissed by the President to apply for a trial by court-martial on the charges upon which they were dismissed. Although the section provides that, upon such application, the President shall convene a court-martial "as soon as the necessities of the service may permit," and in any event within six months, the section does not state within what time the dismissed officer must make his application for trial.

Obviously there must be some time limit within which dismissed officers must act. If no such time limit existed, dismissed officers would occupy a position where they could in most cases thwart the President's action. They could wait until the witnesses against them had disappeared and then make their application for trial. They could also, by delaying a number of years, make their living outside the military or naval service and later, through the operation of section 1230, become entitled to the pay of an officer of the Army or Navy over a period of years during which they had rendered no services.

In *Newton* v. *United States*, 18 Ct. Cl. 435, the court, in considering whether the claimant in that

case could invoke the provisions of section 1230, said (p. 444):

> We are of the opinion that an officer illegally or wrongfully dropped from the rolls by the President, under the act of 1870, should demand his restoration or make his application for court-martial within a reasonable time. Long delay, by changes, promotions, and appointments, may work great confusion in the Army Register and great injury to many officers. Witnesses disappear and facts are forgotten.

The court held under the facts of the above case that "the law should presume acquiescence" by the claimant in his dismissal.

The question of what is a "reasonable time" within which a claimant must apply for trial to preserve his rights under section 1230 must be considered from the standpoint both of the dismissed officer and of the Government. On the part of the dismissed officer no delay is necessary. The application itself is simply a form for which no facts need be gathered or documents prepared. The officer needs time for only one thing—making up his mind whether or not to apply for a trial. For this a few days or, at most, a few weeks are all that can reasonably be necessary.

From the point of view of the Government the question of what was a reasonable time in this case within which to apply for trial must be judged in the light of the fact that the country was then at war. At that time changes, promotions and appointments in the Army were being made daily in great numbers.

Witnesses within the United States were likely to be sent to foreign fields at any moment. In a very brief time the principal witnesses against an officer might become unavailable in the sense that to assemble them would be to disturb military activities and administration.

The claimant in this case waited from February 13, 1918 to July 16, 1918, more than five months, before applying for trial. Since delay beyond a period of two or three weeks could be of no advantage to the claimant, and since a greater delay was such as naturally would, and in fact, did prejudice the Government, the claimant must be held to have so far acquiesced in his dismissal that he can not now invoke in his behalf the provisions of section 1230.

III.

Section 1230 does not give an officer dismissed by the President any right to pay after his dismissal.

The Articles of War in effect in 1918 were enacted by the act of August 29, 1916, 39 Stat. 651. Article 118 provides:

> Officers—Separation from service.—No officer shall be discharged or dismissed from the service except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a court-martial or in mitigation thereof; * * *

This Article recognizes and affirms the power of the President to dismiss an officer from the military service in time of war. If, however, the proper con-

struction of section 1230 is that any officer dismissed by the President can nullify the latter's action by simply applying for trial by court-martial, the President has no effective power of dismissal. Article 118, affirming the President's power to dismiss in time of peace, is, therefore, inconsistent with section 1230 as so interpreted.

Since section 6 of the act of August 29, 1916, enacting Article 118, provides that "all laws and parts of laws in so far as they are inconsistent with this act are hereby repealed," section 1230 was repealed by this act if its meaning is that a dismissal by the President is nullified if no court-martial is convened within six months after the dismissed officer applies for trial. The Court of Claims took this view, saying:

> Our opinion is that section 1230 is superseded by the Articles of War enacted as part of the act of August 29, 1916, 39 Stat. 651, 669. [Rec., page 10.]

It must be noted that section 1230 itself recognizes and affirms the President's power to dismiss an officer. It permits any officer "*dismissed* by order of the President" to apply for trial by court-martial, and it provides that a court-martial shall be convened to try such an officer "on the charges on which he *shall have been dismissed*." It further provides that if a court-martial is not convened within six months, or if, being convened, it does not award dismissal or death, "the order of dismissal by the President shall be void."

It is well settled that a dismissed officer can not be restored to the service except by a new exercise of the appointing power. (*Mimmack* vs. *United States*, 97 U. S. 426; *United States* vs. *Corson*, 114 U. S. 619.) If, therefore, section 1230 means what it says in referring to officers "dismissed" by the President and to a trial on the charges on which the officer has been "dismissed," the section, in so far as it attempts to reinduct dismissed officers into the service otherwise than by a new exercise of the appointing power, is unconstitutional.

When section 1230 was adopted as section 12 of the act of March 3, 1865, 13 Stat. 489, it was the currently accepted opinion that the President could by Executive action, and without making a new appointment with the consent of the Senate, restore an officer previously dismissed by him. The facts in *United States* v. *Corson*, *supra*, show that President Johnson in June, 1865, issued an order purporting to restore to the service an officer whom President Lincoln had dismissed in March of that year. Prior to the year 1878 a number of cases came before the Court of Claims in which the facts showed that the President had purported to restore to the service an officer whom he had previously dismissed. (*Smith* v. *United States*, 2 Ct. Cl. 206; *Winter* v. *United States*, 3 Ct. Cl. 136; *Reynold* v. *United States*, 3 Ct. Cl. 197; *Montgomery* v. *United States*, 5 Ct. Cl. 93.) The court in all these cases did not question the President's power to revoke his dismissal and restore the dismissed officer to the military service. That the President had no constitutional power to restore a

dismissed officer to the service otherwise than by a new appointment was first held by this court in the October term, 1878, in *Mimmack* v. *United States*, 97 U. S. 426.

Congress in passing the act of March 3, 1865, undoubtedly believed that an officer dismissed from the Army would be restored to his former office if the order dismissing him was revoked. It therefore left the President's power of dismissal undisturbed, but provided that under certain circumstances the order of dismissal was to be considered revoked, believing that the dismissed officer would thereby be restored to his position. This court has held, however, that a dismissed officer has the same status as one who has never been in the military service and that he can regain his position only in the manner provided in the Constitution for appointment to office. It follows that the relief which Congress intended to give to dismissed officers was ineffective and that claimant can not rely upon it in claiming the pay and allowance of a colonel after the date of his dismissal by the President.

The judgment should be affirmed.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.
ALBERT OTTINGER,
Assistant Attorney General.
CHARLES H. WESTON,
Special Assistant to the Attorney General.

JANUARY, 1922.

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WALLACE *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 118. Petition for rehearing and motion to remand for further finding.—Decided April 10, 1922.

The Senate, in confirming nominations to office, exercises, not a judicial, but an executive function; and, if it confirms a nomination to a place in the Army existing only through the President's removal of another officer, the legal effect is to sustain the removal no less where the nomination is taken as assurance that a vacancy exists than where the Senate investigates the facts. P. 298.

Petition for rehearing and motion to remand denied.

ON a petition for rehearing and for a remand of the case to the Court of Claims for a further finding of fact. See s. c. 257 U. S. 541.

Mr. Frank S. Bright and *Mr. H. Stanley Hinrichs*, for appellant, submitted the petition and motion.

MR. CHIEF JUSTICE TAFT delivered the opinion of the court.

Counsel for the appellant object to the presumption we indulge in our opinion in this case that the Senate must have known of the dismissal of Wallace when it confirmed the nomination of Lieutenant Colonel Robert Smith, whose appointment and confirmation filled the place considered vacant by Wallace's dismissal. They insist that the absence of knowledge by the Senate of Wallace's removal was conceded by the Government in both the Court of Claims and here. What the Government brief in this court said was that it did not appear that the Senate was advised. But appellant's counsel produce evidence from the record in the Court of Claims upon which they ask that the case be remanded to the Court of Claims to make a finding on this point. Let us concede for the sake of the argument, without deciding, that it is properly a matter of evidence *de hors* the record, and of a finding thereon. The chief item of evidence on which the motion is based is a statement in the record below that

"On or before February 21, 1918, it was the practice of the Adjutant General's office to nominate an officer *vice* the particular officer whose promotion or separation from the service caused the vacancy; and that, after February 21, 1918, the practice of indicating the specific vacancy was discontinued on the recommendation of the Executive Clerk of the Senate."

The contention of the defendant on this showing is that the Senate adopted the practice of confirming appointments to vacancies made by the President without investigation into the cause of the vacancies because of the exigencies of war and the great number of appointments. We do not see that if such facts were found, it would alter

our necessary conclusion. The Senate in confirming nominations is not exercising a judicial but an executive function. It does not have to give a hearing or make an investigation before lawful action, and if it chooses to accept the President's nomination as assurance that there is a vacancy to which the appointment proposed can be made, and acts on that assurance, the legal effect of the confirmation is not affected.

Petition for rehearing and the motion to remand are denied.